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No. 96- _____

In The
Supreme Court of the United States

October Term 1996

MARY E. LEONARD,
Petitioner,

v.

TOWN OF BRIMFIELD and CYNTHIA K. POWERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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October 1996

QUESTION PRESENTED

Was there a compensable taking where a town enforced a one-thousand year flood plain zone, for the first time, after the petitioner purchased land, destroying her investment-backed expectations for two parcels in her four-parcel subdivision?

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

MARY LEONARD respectfully petitions this Court for a writ of certiorari to review the order and opinion of the Massachusetts Supreme Judicial Court affirming the judgment of a Massachusetts Superior Court that the Town of Brimfield did not effectuate a compensable taking of two parcels of land.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 423 Mass. 152, 666 N.E.2d 1300 (1996) and is Appendix A to this petition. The rulings and decision of the Massachusetts Superior is Appendix B. The opinion of the State of Michigan Court of Appeals is Appendix C, and the Findings, Rulings and order for Judgment of the Brimfield Zoning Board of Appeals is Appendix D.

JURISDICTION

The opinion and order of the Massachusetts Supreme Judicial Court was rendered on July 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Unites States Constitution, Fifth Amendment:

". . . nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment:

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

On July 9, 1987, Mary Leonard of Brimfield, Massachusetts sued the Town of Brimfield (Brimfield). In Count III, Leonard asserted that Brimfield's decision to enforce a one thousand

(1,000) year flood plain zone,[1] was a regulatory taking subject to the Just Compensation Clause. A Massachusetts Superior Court entered judgment for Brimfield on Count III. (A.19-30). The Massachusetts Supreme Judicial Court affirmed the judgment (A.1-18).

In August 1986, Leonard bought a sixteen acre lot between the Quaboag River and Dunhamtown Road, Brimfield, Massachusetts. She immediately hired Engineer Donald Smith to draw a plot plan subdividing the land into parcels 12A through 12D. (A.70-71). The parcel described on Leonard's original building permit application was 3.9 acres, which

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[1] See footnote 4, for calculation of estimated flooding frequency.

corresponded with lot 12B of her subdivision. (A.21-23).

Leonard testified that she prepared her subdivision plan in early 1987. The board approved it in 1988 and Leonard recorded it on January 13, 1989.[2] (A.24-25). After her land purchase, Leonard hired contractor Robert Simcus who applied for a building permit to build specifically on parcel 12B of Leonard's subdivision as drawn by Engineer Donald Smith. (A.70-72). Building inspector Jack

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[2] The Superior court found that Leonard's property was a single 16-acre lot and that Leonard had taken no action to subdivide her property until one year after she filed the civil action on appeal before this Court. It found that the ZBA's decision to restrict construction to an elevation greater than three hundred seventy (370) feet allowed Leonard to build on six of the sixteen acres originally purchased.

Keogh issued a permit, but revoked it when he determined that Leonard's land was in a flood plain zone and not formerly subdivided and planning board approved . . . even though Leonard's subdivision was designated "approval not required." (A7-8).[3]

Leonard learned, for the first time, that her land was in a flood plain when Mr. Keogh revoked her building permit. Consequently she sought a special permit before the Brimfield Zoning Board of Appeals (ZBA). Nine months later, in June

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[3] Mr. Keogh explained that he revoked the permit when he notice that the application indicated that the permit applied to a plot of 3.9 acres and the land was in a flood zone. He made it clear that the absence of the stamped and approved subdivision was immaterial to his decision because the planning board would have approved the subdivision merely by stamping it approved. The flood plane zone was the issue.

2, 1987, the ZBA issued a special permit containing the restriction that Leonard build her house at an elevation of at least three hundred seventy (370) feet, which is approximate elevation of a one thousand year (1,000) year flood plain zone (A.70-73).[4]

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[4] Michael Koprowski, who was chairman of the ZBA when it reviewed Leonard's special permit application in 1987, testified incorrectly that Leonard's entire property was in a one hundred (100) year flood plain zone. Leonard's trial counsel suggested that the flood plain zone existing above Leonard's property was a five hundred (500) year zone. The trial court "seemed to recall that [Welch, J.] found that part of Leonard's land was in the one hundred (100) year plain and part of it was in a five hundred (500) year plain.

Koprowski also testified incorrectly that the elevation of the Quaboag River was three hundred sixty (360) feet and that the ZBA wanted a ten (10) foot elevation between Leonard's house and the river. Three hundred sixty (360) feet is the elevation of the one hundred (100) year flood plain zone and not the elevation of the river. Some of Leonard's land is below the one (100) hundred year flood plain, some is in

The Brimfield bylaws require that anyone in a flood plain must get a special permit to build. The Chairman of the Zoning Board of Appeals testified by implication that persons, who built homes near the Quaboag River on Dunhamtown Road, in the flood plain, before Leonard, built without special permits because

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the one hundred (100) hundred year plain (above 360 feet) some of her land is in the five hundred (500) year flood plain (above 365 feet) and some is in the one thousand to twelve hundred year flood plain (above 370 feet, which the elevation required in this case for construction) (A.70-73 [findings of Welch, J.]). Each vertical foot of elevation corresponds approximately to an additional one hundred years in expected frequency of flooding. See for example, three-hundred sixty (360) foot elevation is the elevation for the one hundred year flood plain zone and three-hundred sixty-five (365) is the elevation for the five hundred (500) year flood plain zone. The estimated flood frequency at the three hundred seventy (370) foot elevation, therefore, is one thousand years (1,000) (A.70-73).

there was a different building inspector.

The record shows that Brimfield allowed construction of two houses in the flood plain without enforcing the bylaws requiring a special permit to build at any elevation. The trial court noted (at trial) that Leonard's case represented the first incidence of the town enforcing the flood plain zone by proscribing construction below the elevation of three hundred seventy (370) feet.

Economic Impact On Leonard

Parcels 12C and 12D of Leonard's subdivision have elevations substantially below three hundred seventy (370) feet. (A.20-24). A uncontradicted expert testified that parcels 12C and 12D could have been further subdivided into four

lots, in compliance with the town's building code, having a fair market of twenty to twenty five thousand dollars ($20,000.00 to $25,000.00) each.

REASONS FOR GRANTING THE WRIT

I. The Opinion Of The Massachusetts Supreme Judicial Court Conflicts With The Opinion Of The State Of Michigan Court Of Appeals.

The Massachusetts Supreme Judicial Court reasoned that Leonard did not hold a "reasonable" investment-backed expectation to subdivide her land because the land was in a flood plain when she purchased it. Because Leonard "purchased the property subject to the restrictions on building in a flood plain, the reasoning continued, she may not complain about the loss of a right she never

acquired. (A.11), citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992), and ignoring Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (The landowners' rights were not altered because they acquired the land well after the commission had begun to implement its policy. So long as the commission could not have deprived the prior owners of the easement without compensation, the prior owners must be understood to have transferred their full property rights in conveying the lot).[5]

On June 4, the State of Michigan

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[5] The Supreme Judicial Court also determined that the economic impact on Leonard was not severe since she was able to build one house and finally, it determined that the character of the governmental action did not show physical invasion. (A.12-14).

State Court of Appeals followed Nollan v. California Coastal Comm'n, reasoning that a sequence of regulation and then ownership would not preclude compensation for a taking where it would otherwise be due. See K & K Construction Inc. v. Department of Natural Resources. (A.31-69, [specifically A.44-46]). This reasoning directly conflicts with the reasoning of the Massachusetts Court that land restriction which existed at the time of purchase bars an action for taking because the government cannot take what did belong to the petitioner.

II. The Opinion of the Massachusetts Supreme Judicial Court Was Erroneous Because There Was A Compensable Taking Where Brimfield Enforced A One-Thousand Year Flood Plain Zone, For The First Time, After Leonard Purchased Land, Which Destroyed Her Investment-Backed Expectations For Two Of Four Parcels.

A. Unless Governmental Action Amounts to a "Per Se [Categorical] Taking" Courts Must Engage in Fact-Specific Analysis, Using a Three-Pronged Test to Determine Whether There Is Violation of the Takings Clause.

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use without just compensation." U.S. Const., Amend. V. The Takings Clause is applicable to the states through the Fourteenth Amendment. See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith,

449 U.S. 155, 160 (1980).

This Court has refused to develop any set formula for determining which property-right infringements amount to compensable takings, relying "instead on ad hoc, factual inquiries into the circumstances of each particular case." Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986). Three factors paramount in this inquiry are: (1) the regulation's "economic impact" on the property owner; (2) the extent to which the regulation interferes with "distinct investment-backed expectations:" and (3) the "character" of the interference, that is, whether the governmental action is more akin to a physical invasion or to a necessary readjustment of economic

benefits and burdens. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). accord Connolly, 475 U.S. at 225; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

This Court identified two categories of governmental action that are per se compensable violations of the takings clause and require no further case-specific analysis. See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 120 L.Ed.2d 798, 812 (1992). The first category is a physical invasion of property no matter what the justification. Id. The second category is regulatory action that denies "all economically beneficial or productive use of land." Id. 112 S.Ct. 2886, 120 L.Ed.2d

at 813, citing, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (hallmark of per se compensable taking is denial of "economically viable use of [an owner's] land"); Nollan v. California Costal Comm'n, 483 U.S. 825, 834 (1987) (same); McAndrews v. Fleet Bank Of Massachusetts, N.A., 989 F.2d 13, 18 n.7 (1993). Other less sweeping regulatory action, however, even action that does not unquestionably deny "all economically beneficial or productive use of land," may still amount to a compensable taking under federal law. The determination depends upon the results of a case-specific three-pronged test. See the last paragraph in this Section and Section I.C., below.

According to the Lucas Court, the

standard, "all economically beneficial or productive use of land," is difficult to apply and causes inconsistent results. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d. at 813 n.7. Justice Scalia pointed out that this standard lacks precision because it does not make clear the "property interest" against which the loss of value is to be measured. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 813 n.7.[6]

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[6] Because of this lack of precision, even this Court had produced disparate holdings. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 813 n.7., comparing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to effect a taking), with Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking). See also Rose, Mahon Reconstructed: Why The Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566-569 (1984). It is important, for this reason, to clarify "takings" jurisprudence for the States.

Justice Scalia suggests that the resolution to this imprecision, even for per se compensable takings, requires consideration of the property owner's reasonable expectations. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 813. Justice Scalia made it clear that property owners, such as Leonard, who may not be able to claim the benefit of the categorical formulation ("all economically beneficial or productive use of land"), may still rely upon a well-established rule that "the economic impact of regulatory action on the claimant and . . . the extent to which the regulation has interfered with [her] distinct investment-backed expectations" are keenly relevant to takings analysis.

Id. 112 S.Ct. 2886, 120 L.Ed.2d at 815 n.8, citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

B. Brimfield's Regulatory Action Caused Leonard to Lose The Market Value of Two Complete Parcels in Her Subdivision.

Leonard suffered a severe economic penalty when the Zoning Board of Appeals enforced the one-thousand year (1,000) year flood. Penn Cent. Transp, 438 U.S. at 124; McAndrews, 989 F.2d at 18. Leonard showed that parcels 12C and 12D are below three hundred seventy (370) feet in elevation (R.73,75-76,175-176). The special permit issued to Leonard barred construction below this elevation (R.73). Consequently, as a result of Brimfield's ZBA special permit

restriction, parcels 12C and 12D lost all resale value as building lots.

Uncontradicted testimony from Leonard and from a real estate expert showed that the market value of these four parcels (12C and 12D each further subdivided) was at least in the range $80,000.00 and $120,000.00 (R.122-25,83). The appraiser suggested that the parcels' frontage on the Quaboag River very likely further enhanced their resale value (R.135). When Brimfield enforced its flood plain zone substantially above the five hundred year flood plain, for the first time, (R.40-42,73), Leonard lost the entire resale value of parcels 12C and 12D. For these reasons, the economic impact on Leonard was severe and

satisfied the first prong in a "takings" analysis. Penn Cent. Transp, 438 U.S. at 124; McAndrews, 989 F.2d at 18.

C. Brimfield's Regulatory Action Destroyed Leonard's Distinct Investment Backed Expectations.

Brimfield frustrated Leonard's "distinct investment-backed expectations." Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 815 n.8; Penn Cent. Transp, 438 U.S. at 124; McAndrews, 989 F.2d at 18. Leonard testified that, when she bought her land, she intended to subdivide it and sell some lots. To this end, she hired engineer Donald Smith to draw a plot plan subdividing the land into four parcels. (A.70-72). Even her original building permit reflected Leonard's subdivided four parcels (A.70-

72), which the Brimfield Planning Board eventually approved, and which she recorded on January 13, 1989. (A.24-25).

Because the special permit elevation limitation completely destroyed resale value of two of the subdivided lots, Leonard's distinct investment-backed expectations similarly frustrated. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 815 n.8 (investment-backed expectations keenly relevant to takings analysis); Penn Cent. Transp, 438 U.S. at 124 (same); McAndrews, 989 F.2d at 18 (same).

Leonard recognizes that a takings analysis ordinarily does not consider the effect of a governmental restriction on particular segments of the claimant's property, but on the parcel as a whole.

Fragopoulos v. Rent Control Bd., 408 Mass. 302, 308 (1990); Penn Cent. Transp., 438 U.S. at 130-131. In this case, however, Leonard's particular investment-backed expectation was profit from subdividing and selling certain parcels, which should permit treating each of the four parcels separately. Otherwise the "distinct investment-backed expectations" prong of the federal analysis becomes meaningless.

D. Brimfield Imposed its Special Permit Requirement Inequitably Against And Regulated Against a Highly Unlikely Occurrence.

To further inform a "takings" analysis, courts should consider whether other landowners, similarly situated, were permitted to continue a use denied

Leonard. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 822. Brimfield bylaws require that persons building in a flood plain obtain a special permit.

ZBA Chairman Koprowski testified that other persons who built on Dunhamtown Road, before Leonard, were allowed to build without obtaining the required special permit because there was a different building inspector. The restrictions imposed on Leonard represented not only the first time that the ZBA imposed the three hundred seventy (370) foot elevation limitation, but also was the first time that Brimfield enforced its flood plain, at all regardless of the proposed building elevation.

That Brimfield enforced a one thousand (1,000) year flood plain zone, for the first time, and required a special permit to build in this flood plain (at any elevation) for the first time, is relevant to this Court's review of whether the action was a compensable "taking" because other land owners who were similarly situated (to the extent that they built in a flood plain) were permitted a use denied Leonard. Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 822.

Leonard recognizes that the validity of the ZBA's action is not at issue. However, whether the ZBA's action was discriminatory, unfair, or ostensibly "regulated" a highly unlikely event is relevant to whether this Court should

deem the action a "taking" under federal law. See Lopes v. City of Peabody, 417 Mass. 299, 301-03 (1994) (distinguishing between an action which challenges the validity of regulatory action, and an action which asserts that valid regulatory action is a "taking"). See Also Lopes, 417 Mass. 305 n.9 (emphasizing that this Court did not say that a regulatory taking occurred only when property was rendered valueless), referring to Lucas, 112 S.Ct. 2886.

According to the Supreme Judicial Court in Lopes, regulatory action based on an event likely to occur only once each hundred (100) years may not warrant the action. Lopes, 417 Mass. 306 n.12. Here, the event anticipated by

regulation, presumably will occur approximately once every one thousand (1,000) years and, for this reason, further supports the conclusion that Brimfield's action should be deemed a "taking" because it was discriminatory and was based on the occurrence of a highly unlikely event. Id.; Lucas, 112 S.Ct. 2886, 120 L.Ed.2d at 822.

Considered in perspective, Brimfield may wait five times the age of the United States before the Quaboag River will rise to a level of three hundred seventy (370) feet. The river has presumably has risen to this level only twice since the time of Christ. For these reasons, Brimfield's regulatory action should be deemed a taking.

III. The Questions Presented Are Important.

Because the government has the right to interfere with or to take private property, its continued obligation to pay for such property is important to citizen owners' due process rights. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California, 482 U.S. 304, 314 (1987). The right to just compensation is grounded in the Constitution itself. Jacobs v. United States, 290 U.S. 13, 16 (1933).

There is a tension between a citizen's right not to be deprived of private property without due process and the government's land-use planning function. Although a taking is plain when

there is exercise of eminent domain, whether a land regulation becomes a taking is less clear. Consequently, Massachusetts has misapplied Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), ignored Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and permitted Brimfield to take Leonard's property without paying for it. In so doing, Massachusetts engaged in a "taking", and the Supreme Judicial Court engaged in a "takings clause" analysis in conflict with Michigan's analysis. Because governments will and must continue to regulate land use, this issue will continue to arise. Therefore, the question presented is ripe. This Court should resolve the conflict between the

states and give further guidance on how to analyze correctly an alleged regulatory taking.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted

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APPENDIX A

MARY E. LEONARD vs. TOWN OF BRIMFIELD & another.[1]

SJC-07008

423 Mass. 152, 666 N.E.2d 1300

March 5, 1996, Argued

July 11, 1996, Decided

PRIOR HISTORY: Hampden. Civil action commenced in the Superior Court Department on July 9, 1987. Motions to amend and to dismiss were heard by William H. Welch, J., and the case was heard by John F. Murphy, Jr., J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment Affirmed

COUNSEL: Greg T. Schubert for the Plaintiff.

William Hewig, III, for the Defendants.

JUDGES: Present: Liacos, C.J., Wilkins,

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[1] Cynthia K. Powers, individually and as chairperson of the Brimfield conservation commission.

Abrams, Lynch, & Greaney, JJ.

OPINION: LYNCH, J.

The plaintiff owns sixteen acres of land in the town of Brimfield (town). This action, commenced in 1987, is one of three filed by the plaintiff involving this property contesting actions by the town which effectively limit the plaintiff's use of this land. The plaintiff alleges that the town is artificially channeling surface water onto the property and is improperly enforcing a flood plain zone which restricts development of the property.

As required by the town zoning-by-law, the plaintiff applied to the zoning board of appeals (board) for a special permit to building on her land as it was

located in an area designated as a flood plain zone. The board issued a special permit which limited construction on land at or above the 370-foot elevation mark. This effectively limits construction to approximately six of the plaintiff's sixteen acres.

In the first action the plaintiff appealed from the board's special permit restriction as arbitrary or capricious. A Superior Court judge upheld the board's decision, and the Appeals Court affirmed. 27 Mass. App. Ct. 1408 (1989). We denied further appellate review. 405 Mass. 1204 (1989).

The second action involved water channeling claims and was settled by a released dated October 28, 1988. In that

release, the plaintiff discharged the town and the town's insurer from all water channeling claims to the date including the channeling claims in the present case.

In this action the plaintiff alleges that: (1) the town is liable for damages for artificially channeling surface water onto her property (counts one and two); (2) the town's enforcement of its flood plain restriction constituted a compensable taking under the United States Constitution (count three); and (3) the plaintiff's civil rights had been violated by the chairperson of the Brimfield conservation commission and she was entitled to damages under G.L. c. 12,

§ 11I (1994 ed.) (count four).[2]

The defendants moved to dismiss counts one, two, and three of the complaint arguing that the water channeling release of October 28, 1988, barred those claims. The plaintiff countered by filing a motion to amend with alternative amended complaints. In the first amended complaint, she sought to limit her water channeling claim to damages incurred after the date of the release. In the second amended complaint, she alleged that the enforcement by the town of the flood plain restriction constituted a compensable taking under State law.

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[2] There was no appeal from the denial of that claim.

The motion judge denied the motion to amend, and allowed the defendants' motion to dismiss counts one and two, treating it as a motion for summary judgment.

A bench trial was held on counts three and four of the present action. The judge found for the defendants on both counts and dismissed the plaintiff's claims for damages. We transferred the case here on our own motion. The plaintiff argues that the judge applied the wrong standard to decide whether the enforcement of the flood plain restriction was a compensable "taking" under Federal law. She also argues that the motion judge erred in denying her motion to amend the complaint.

The validity of the board's enforcement of this zoning by-law has been adjudicated. Therefore, we do not consider issues settled in previous litigation as to the actual likelihood of flooding at the various elevations, nor the validity of the special permit as applied to the plaintiff's land. The only issues before use are whether the plaintiff should be compensated by the town for the decrease in value of her land caused by the restriction and whether she should have been permitted to amend her complaint.

The regulatory "taking" issue. The plaintiff argues that the town's actions constitute a taking under the Fifth Amendment to the United States

Constitution.

When a regulatory taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, Federal law has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred; "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" Connelly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225, 89 L. Ed. 2D 166, 106 S. Ct. 1018 (1986), quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124,

57 L.Ed. 2D 631, 98 S. Ct. 2646 (1978).

(1) Investment-backed expectations. The plaintiff contends that, at the time of purchase, she intended to subdivide the sixteen acres and because of the special permit restriction, she lost the market value of two parcels in her subdivision.

A property owner's investment-backed expectations must be reasonable and predicated on existing conditions. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 81 L. Ed. 2D 815, 104 S. Ct. 2862 (1984. It must be more than a "unilateral expectation or an abstract need." Id., quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 66 L. Ed. 2D 358, 101 S. Ct.

446 (1980). The plaintiff's argument fails because she could not have had a reasonable, investment-backed expectation that she would have been permitted to subdivide the flood plain property.

Her property was within a designated flood plain zone and a special permit was required for construction on the lots in question.[3] A the time she purchased the property she had constructive notice of a zoning map, which was available for viewing at the building inspector's office. Her position that the flood plain

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[3] We have held that a purchaser of land subject to a restriction at the time of purchase has a right to challenge the continued application of the restriction. Lopes v. Peabody, 417 Mass. 299 303, 629 N.E.2d 1312 (1994). Here, the plaintiff availed herself of her right to contest the special permit restriction, but did not prevail.

map should have been recorded with the registry of deeds is without merit. The statute which sets forth the requirements of municipal zoning regulations contains no such requirement, see e.g., G.L. c. 40A (1994 ed), and she offers no citation to support this argument.

Because she purchased the property subject to the restriction on building in a flood plain, she may not complain about the loss of a right she never acquired. See Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1027, 120 L. Ed. 2D 798, 112 S. Ct. 2886 (1992). "The government is not required to compensate an individual for denying him the right to use that which he has never owned." Fragopoulos v. Rent Control Bd. Of

Cambridge, 383 Mass. 152, 160, 418 N.E.2d 335 (1981).

Furthermore, the trial judge found that the parcel at issue is a single sixteen-acre parcel, not individual lots within this parcel as the plaintiff contends, and that the plaintiff had taken no action to subdivide the property. This finding is completely supported by the record. Mass. R. Civ. P. 52 (a), 365 Mass. 816 (1974). Kendall v. Selvaggio, 413 Mass. 619, 620, 602 N.E.2d 206 (1992). The plaintiff did not have a reasonable investment-backed expectation that she could subdivide the property.

(2) Economic Impact. The plaintiff's theory of economic impact on the property was also made without considering the

existing zoning restrictions.

Even if we ignore the fact that the zoning restriction was in place prior to the plaintiff's purchase of the property, the evidence was insufficient to show that the economic impact was severe. The plaintiff's economic loss argument is based on her inability to build houses on approximately ten acres of her sixteen-acre parcel. This has not frustrated her purpose to build her own home on the parcel which she has done. There is no dispute that the complete sixteen acres is suitable for agricultural, horticultural, and recreational purposes. The land was used for agricultural purposes prior to her purchase and can continue to be used as such. As stated by

the United States Supreme Court: "Zoning laws are, of course the classic example [of land use regulations] which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property" (citations omitted.) Penn Cent. Transp. Co. v. New York City, supra at 125.

(3) The character of the governmental action. The final factor that may be considered is the character of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." Id. at 124. Here, there was no physical invasion of the plaintiff's property alleged apart from the water

channeling claims. Those claims are barred by the release given in connection with her prior litigation.[4] Her takings claim is based on the zoning restriction and special permit process which is not a physical invasion by the government.

Thus, in view of the facts before us, the effect of the zoning and special permit restriction on the plaintiff's land does not constitute a compensable taking under federal law.

(4) Disallowance of motions to amend. The plaintiff also argues that she should have been permitted to amend her complaint to include claims based on

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[4] The release states in pertinent part: "This release excludes cases # 87-1238 [the instant case] except as to water [channeling] claims."

water channeling that occurred after October 28, 1988, and, in the alternative, a claim for damages under State law for the devaluation of her property caused by the zoning restriction. Under the rules of civil procedure, leave to amend a complaint shall be "freely given when justice so requires." Mass. R. Civ. P. 15(a), 365 Mass. 761 (1974). The decision to grant such a motion lies within the discretion of the judge, but leave should be granted unless there are good reasons for denying the motion. Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264, 565 N.E.2d 1180 (1991).

The judge denied the motion to amend for the following reasons: (1) the motion

to amend was filed more than five years after the plaintiff filed the original complaint; (2) the case had been called as an "inventory case," thus the judge believed that the trial was imminent; (3) the claims were interrelated with the claims that had been adjudicated or settled in prior proceedings.

In these circumstances it was not an abuse of discretion for the judge to deny the motions to amend. We have considered undue delay, imminence of trial, as well as futility of the claim to be valid reasons for the denial of a motion to amend. See All Seasons Servs., Inc. v. Commissioner of Health & Hosps. Of Boston 416 Mass. 269, 272, 620 N.E.2d 778 (1993); Mathis v. Massachusetts Elec.

Co., supra, at 265-265; Castelluci v. United States Fidelity & Guar. Co., 372 Mass. 288, 292, 361 N.E.2d 1264 (1977).

Although the case was not actually tried for seventeen months after the denial of the motion to amend, the case had been pending for over five years and the judge believed the trial was imminent. Those facts alone provided a sufficient basis for the judge's action. The plaintiff's motion to amend was properly denied.

Judgment Affirmed.

APPENDIX B

MARY E. LEONARD vs. TOWN OF BRIMFIELD & another.[5]

Superior Court Civil Action No. 87-1238H

FINDINGS, RULINGS AND ORDER

The plaintiff filed this action in the Hampden County Superior Court, C.A. No. 87-1238 on July 17, 1987. On July 31, 1992, Superior Court (Welch, J.) dismissed Counts I. And II of the plaintiff's Complaint (relating to allegations of water damage) as based on claims which were the subject of an earlier release. That left for the trial Count III (claim for compensable taking

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[5] Cynthia K. Powers, individually and as chairperson of the Brimfield conservation commission.

under the fifth amendment of the United States Constitution, and through the due process clause of the fourteenth amendment, alleging an unconstitutional taking of the 10 acres of property below the 370-foot-elevation level, (upon which the plaintiff cannot build a house), and Court IV (violations of M.G.L. c. 12, §11I, alleging a "joint venture" by the defendants Cynthia Powers and members of the Conservation Commission to have a building permit issued by Building Inspector Jack Keough revoked through coercion, intimidation and threats).

Based upon all of the credible evidence, the exhibits and the reasonable inferences to be drawn therefrom, I find and rule as follows:

1. The plaintiff, Mary E. Leonard, was at the time of the filing of this suit the owner of 16 acres of land lying between the Quaboag River and Dunhamtown Road in Brimfield, Massachusetts. The area was and is zoned Flood Plain under Brimfield's zoning bylaws.

On March 30, 1987, Jack Keough, Brimfield's Building Inspector, issued building permit no. 8726 upon request of the plaintiff, for construction of a single-family house upon so-called "lot 12B" of the Leonard property. On or about April 1, 1987, Mr. Keough had a conversation with Cynthia Powers, of Brimfield's Conservation Commission. In that conversation, Ms. Powers told Mr. Keough that lot 12 (which as then the

designation for the entire 16 acres) was in a wetland and required a special permit from the Board of Appeals. Following that conversation, Mr. Keough checked the Town's zoning maps and determined that Lot 12 was within the Town's flood plain zone, and therefore, under the Town's zoning bylaws, construction required a special permit. As a result of his own research, Mr. Keough then proceeded to revoke the March 30th building permit on April 2, 1987.

The plaintiff Mary Leonard then filed a request for a special permit with the Board of Appeals on or about April 13, 1987. By a decision dated June 2, 1987, the Board of Appeals granted the request for a special permit but limited

construction to land at or above the 370-foot-elevation mark. Approximately 6 our of the total 16 acres are situated above the 370-foot-elevation mark. The plaintiff then appealed the Board of Appeals' June 2 1987 decision as arbitrary and capricious to the Superior Court. Her case was captioned "Mary E. Leonard v. Zoning Board of Appeals of Brimfield" and assigned Hampden Superior C.A. No. 87-1077. After trial the Superior Court (Welch, J.) upheld the June 2, 1987 decision in his Findings, Rulings and Order for Judgment dated October 19, 1987. The plaintiff appealed to the Massachusetts Appeals court, which affirmed the judgment of the Superior Court on April 27, 1989, 27 Mass. App.

Ct. 1405 (1989). The Supreme Judicial Court denied further appellate review on August 17, 1989, 405 Mass. 1204 (1989). Following the exhaustion of her appeals, the plaintiff then proceeded to construction her house on the 6 acres of her parcel located above the 370-foot-elevation mark.

2. At the time of the issuance of the original building permit, (March 20, 1987), and also at the time of filing of this lawsuit, (July 17, 1987) the subject property was a single 16-acre lot and the plaintiff had taken no action to subdivide her property. Approximately one year after she filed this action, an Approval Not Required ("ANR") subdivision plan was filed with the Brimfield

Planning Board. This plan was not recorded until January 13, 1989 (Book 263, Page 33 of the Hampden County Registry of Deed).[6]

Under the terms of the special permit, 6 acres of the 16 acre parcel was available for building construction. A portion of this 6 acres was used by plaintiff to construct her own home.

A previous owner of the property had registered the property under G.L. c. 61A as agricultural land. The plaintiff's predecessor in title had purchased the property subject to the agricultural lien

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[6] This plan indicates it was prepared for "Gregory Schubert" in March of 1987. It was submitted to the Planning Board July 20, 1988, and was not recorded until January 13, 1989. Plaintiff's name does not appear on the plan. (Exhibit #4).

with the intention of operating a nursery on the property (pg. 12, transcript deposition Brian Haley). When plaintiff purchased the property the lien was removed as was the agricultural designation. [7] There is no dispute that the complete 16 acres is suitable for agricultural, horticultural and or recreational purposes.

RULINGS

3. Plaintiff seeks damages, alleging a constructive taking of two building lots shown as lots 12C and 12D on the Schubert plan of land (Exhibit #4). The plaintiff refers to Lucas v. South

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[7] At attempt was made by members of the Conservation Commission to have the town exercise its right of first refusal and purchase the property. The town's financial problems prevented the exercise of this right.

Carolina Coastal Council, 112 S. Ct. 2886 (1992). The plaintiff's reliance on Lucas is misplaced. The Lucas case dealt with a situation where after the plaintiff purchases the beach front property the state declared the property to be within the "critical area", thereby depriving the owner of all beneficial economic use of his property. That is not the case at bar. In the case at bar the Flood Plain Zoning Maps and requirements for a special permit were in effect at the time plaintiff purchased the land.

Nor did the regulatory action deprive plaintiff of all beneficial use of her property. Turnpike Realty Company, Inc. v. Dedham, 362 Mass. 721 (1972);

also Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979). Unconstitutional takings are those actions which "strip private property of all practical value to them or to anyone acquiring it, leaving them only with the burden of paying taxes on it." Lovequist id., at 20. In the case at bar the plaintiff cannot fairly claim that she has been deprived of all beneficial use of her property.

4. The evidence at trial is undisputed that the actions of the Brimfield's Zoning Board of Appeals, and Brimfield's building inspector Jack Keough in enforcing Brimfield's bylaws were at all times in compliance with the Town's bylaws, and General Laws Chapter

40A.

There is no credible evidence the Cynthia Powers either individually or as chairperson of the Conservation Commission pursued a coarse of opposition to plaintiff or of plaintiff's right secured by the constitution or laws of the Commonwealth. Nor is there any credible evidence that she sought a selective enforcement of the flood plain zone. The actions attributable to Cynthia Powers fall far short of proof of acts intended to ". . . Frighten, harass, or humiliate by actual use of threats, intimidation or coercion" required to prevail under G.L. c. 12, § 11I. Silva v. Building Inspector of West bridgewater, et al., 35 mass. App. Ct. 451 (1993).

ORDER

Count III - Plaintiff's claim for damages against the Town of Brimfield is dismissed. Judgment for defendant Town of Brimfield.

Count IV - Plaintiff's claim for Violation of M.G.L. c. 12, §11I is dismissed. Judgment for the defendant Cynthia K. Powers individually and as Chairperson of the Brimfield Conservation Commission.

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John F. Murphy, Jr.,
Justice of the Superior Court

Entered: April 13, 1994

APPENDIX C

K & K CONSTRUCTION, INC. J.F.K COMPANY, AND RESORTS AND COMPANY, vs. DEPARTMENT OF NATURAL RESOURCES AND MICHIGAN ASSOCIATION OF HOME BUILDERS.

No. 168393

June 4, 1996, Published

JUDGES: Jansen, P.J., and Taylor and J.P. Noecker. JJ.

OPINION by: JANSEN, P.J.

This is a regulatory taking case. Defendant Department of Natural Resources Appeals as of right from a September 8, 1993, judgment of the Court of Claims in plaintiff's favor. The Court of Claims determined that a taking had occurred as a result of defendant's decision to deny plaintiff's application for a permit to build a restaurant on a parcel of land on the basis that the land was protected

wetlands. The Court of Claims awarded $3,245,256 for the property taken, plus interest of $1,574,522.60, and $459,400 based on a temporary taking of part of the land. We affirm.

I.

Plaintiffs own approximately 82 acres of property in Waterford Township in Oakland County. The property was acquired in 1976 by Joseph and Elain Kosik. J.F.K. Company is a Michigan limited partnership consisting of the five children of the Kosiks. J.F.K. Company is a part owner of the property through a quit claim deed executed by the Kosiks. K & K Construction is a Michigan corporation, of which Joseph Kosik and one of his sons are the sole

shareholders. K & K Construction has no ownership interest in the property involved in this case. Resorts and Company is a Michigan co-partnership and is a part owner of the 82 acres of property.

The Court of Claims concluded that the property consisted of four distinct parcels. The parcel at issue was parcel 1 on which J.F.K. Company wished to build a C.J. Barrymore's Restaurant. Parcel 1 covered approximately 55 acres of the total property. On May 28, 1988, plaintiffs applied for a permit to develop this property. On November 7, 1988, defendant denied the permit based on a determination that approximately 28 acres of the property was protected

wetlands under the Wetland Protection Act (WPA), M.C.L. 281.701 et seq.: M.S.A. 18.595 (51) et seq.

Plaintiffs then filed the present action on December 29, 1988, in the Court of Claims. Plaintiffs initially sought a declaratory ruling that the area is not wetlands, and injunctive relief against defendant from enforcing the WPA and seeking damages under the WPA. Plaintiffs sought a determination that defendant's actions constituted a taking of their property for which they were entitled to just compensation. On May 1, 1990, plaintiffs submitted a second application for a permit to fill approximately 3.17 acres of wetlands and to convert 5.26 acres of upland to wetlands. This plan

was known as the "Goga Plan" and involved a total of over 72 acres of property on parcels 1, 2, and 4. This second application was also denied on July 26, 1990.

Trial was held before the Court of Claims, sitting as the factfinder, on December 17, 1991. The only issue before the court was whether there was a taking because of the permit denial such that plaintiffs were entitled to just compensation. On November 2, 1992, the Court of Claims issued its opinion and order determining that a taking occurred because the wetlands restrictions rendered the property essentially worthless as commercial real estate, and that plaintiffs were therefore entitled

to just compensation. After various post-judgment motions, and consideration of the Goga Plan, the Court of Claims awarded a total of $3,279,178 in favor of plaintiffs.

II.

Plaintiff contend that defendant's action of denying the permit to fill the wetlands constitute an unconstitutional taking of property without just compensation. The Fifth Amendment to the federal Constitution provides: "nor shall private property be taken for public use, without just compensation." Similarly, the Michigan Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a

manner prescribed by law." Const. 1963, art. 10, § 2. The Takings Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment . Dolan v. City of Tigard, 512 U.S.___; 114 S. Ct. 2309; 129 L. Ed. 304, 315 (1994; Peterman v. Dep't of Natural Resources, 446 Mich. 177, 184 n.10; 521 N.E.2d 499 (1994).

A.

Property may only be taken when there exists an essential nexus between a legitimate state interest and the taking. If the nexus exists, then there must be a "rough proportionality" between the manner of the taking and the actual state interest involved. Dolan, supra. p. 317; Peterman, supra, p. 201. The parties do

not question that the state has a legitimate interest in preserving and protecting wetlands. See Attorney General ex rel Dep't of Natural Resources v. Huron Co. Road Comm'n, 212 Mich. Ap. 510, 516; 538 N.W.2d 68 (1995))"[t]he primary purpose of the WPA is to ensure that wetland habitats are preserved and protected"). See Harkins v. Dep't of Natural Resources, 206 Mich. App. 317, 324; 520 N.W.2d 653 (1994) ("the WPA unquestionably advances a legitimate state interest"). Thus, the crucial issue with which we are faced is whether there is a taking within the meaning of the Fifth Amendment to require just compensation.

The United States Supreme Court has

explained that the Fifth Amendment is violated when land use regulation does not substantially advance legitimate states interests or denies an owner economically viable use of the owner's land. Lucas v. South Carolina Coastal Council, 505 U.S. 1003; 112 S. Ct. 2886; 120 L. Ed. 2D 798, 813 (1992. In land use regulation cases, such as this, it has been recognized that when property may be regulated to a certain extent, if the regulation goes to far it will be recognized as a taking. Id., p. 812; Volkema v. Dep't of Natural Resources, 214 Mich. App. 66, 69; 542 N.W.2d 282 (1995). The Supreme Court has not set forth any set formula regarding what constitutes going "too far," but has

rather engaged in ad hoc, factual inquires. Lucas, supra, p. 812.

However, there are two distinct categories of regulatory action that require compensation without case-specific inquiry. The first category encompasses regulation that compel the property owner to suffer a physical invasion of the property. The second category is where regulation denies all economically beneficial or productive use of the land. Id., pp. 812-13. The Court of Claims concluded that application of the WPA denied plaintiffs all economically beneficial or productive use of the land.

The United States Supreme Court has noted that "affirmatively supporting a

compensation requirement . . . [are] regulations that leave the owner of land without economically beneficial or productive options for its use-typically . . . by requiring land to be left substantially in its natural state." Id. p. 814. In Lucas, the court held that where the state seeks to sustain regulation that deprives property of all economically beneficial use, the state may resist compensation only if an inquiry into the nature of the owner's property shows that the proscribed use interest were not part of the title to begin with. Id. p. 820. Thus, a regulation that prohibits all economically beneficial use of land cannot be newly legislated or decreed

without compensation, but must inhere in the title itself, with the restriction that background principles of state property law may already place on land ownership. Id. p. 821.

In the case before us, we reject defendant's claim that the permit denial was based on a fundamental principle of Michigan property law. Defendant claims that such a principle is found in our state Constitution:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const. 1963, art. 4, § 52.].

In Lucas, the Supreme court made clear that the state must do more than proffer the legislatures declaration that the uses the landowner desires are inconsistent with the public interest. Rather, the state must identify background principles of nuisance and property that prohibit the uses of the landowner intends in the circumstances in which the property is found. Lucas, supra, pp. 822-23.

The constitutional provision cited above is not a principle of nuisance and property law. The decision to build a restaurant on land, or a request to fill in wetland, do not constitute nuisances that the government may abate. See Id. , p. 821; Miller Pros v. Dep't of Natural

Resources, 203 Mich. App. Ct. 674, 682; 513 N.W.2d 217 91994). We are not aware of any common law preventing the building of a restaurant on plaintiff's land. Thus, the generalized invocation of public interests in the state Constitution, and the legislatures's declaration in the WPA and the Michigan Environmental Protection Act. M.C.L. 691.1201 et. Seq.; MSA 14.528(201) et seq., do not constitute background principles if nuisance and property law sufficient to prohibit the use of plaintiffs' land without just compensation.

B.

Defendant also contends that because the regulation, the WPA, was enacted

before the quit claim deed passed title to J.F.K. Company, plaintiffs are precluded from compensation. We do not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2; 107 S. Ct. 3141; 97 L. Ed. 2D 677 (1987) (The landowner's rights were not altered because they acquired the land well after the commission had begun to implement its policy. So long as the commission could not have deprived the prior owners of the easement without compensation, the prior owners must be understood to have transferred their full property rights in conveying the lot.).

In this case, the property was acquired by Joseph and Elaine Kosik in 1976. They transferred the property through a quit claim deed to J.F.K. Company in 1986. The WPA went into effect in 190. The passage of the WPA cannot be understood as depriving J.F.K Company of just compensation merely because the WPA as in effect when the quit claim deed was executed. Because we have concluded that the proscribed use interest in this case do not inhere in the title itself, the timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation. Lucas, supra, pp. 820-23.

C.

Next, in order to determine if

plaintiffs were deprived of all economically beneficial or productive use of their land, we must decide what specific property was affected by the permit denial. It is defendant's contention that the Court of Claims should have considered all 82 acres of the property in determining whether a taking occurred in this case. At trial, plaintiffs argued that the Court of Claims should only consider the 28 acres that were declared to be wetlands. The Court of Claims rejected both contentions and found that it would consider the 55 acres designated as parcel 1. On appeal, plaintiffs urge use to affirm the Court of Claims' ruling. We find that the Court of Claims' factual finding is this regard

is not clearly erroneous. MCR 2.613(c).

A proper resolution of this issue is not subject to any clear rule. In Bevin v. Brandon Twp. 438 Mich. 385, 393; 475 N.W.2d 37 (1991), modified 439 Mich. 1202 (1991, our Supreme Court held that generally , a person's property should be considered as a whole when deciding whether a regularity taking has occurred. In Bevin, however, the property in question consisted of two contiguous parcels under the same ownership and subject to a single zoning scheme. In the case before us, parcel 1 is zoned for commercial use, while parcel 2, 3, and 4 are zoned for residential use. Further, there is no single owner of all four parcels. Parcel I is owned in part by

J.F.K. Company, and parcels 2 and 4 are owned solely by J.F.K. Company. Parcel 3 is owned by both J. F.K. Company and Resorts and Company. Finally, the regulation is this case does not affect all four parcels. Only parcel 1 is affected by the WPA.

More recently, this Court relied on Loveladies Harbor, Inc. V. United States, 28 F.2d 1171 (CA Fed. 1994) in analyzing a similar issue. See Volkema, supra, pp. 71-72. In Loveladies Harbor, the plaintiffs originally owned 250 acres of land which and been acquired in 1958. By 1972, 199 acres of the land had been developed, before the enactment of § 404 of the Clean Water Act. The plaintiffs sought a fill permit to develop the

remaining 51 acres for residential use. The permit was initially denied, but the state eventually entered into an agreement whereby the plaintiffs could develop 12.5 acres of the land. However, the plaintiffs also had to seek permit approval from the Army Corps of Engineers. The Corps ultimately denied the permit.

The court in Loveladies Harbor had to determine the "denominator parcel" in order to determine whether a talking had occurred. The court rejected any brightline rule and instead adopted a flexible approach to account for factual nuances of each individual case. Loveladies Harbor, supra. p.1181. This approach was also recently adopted by

this Court in Volkema, supra, p. 73. The court in loveladies Harbor, found that the 199 acres that had been developed before enactment of § 404 of the Clean Water Act should not be considered as part of the denominator because no effort had been made by the state to regulate that land. With regard to the remaining 51 acres, the court found that the 38.5 acres had been essentially given to the state in exchange for the permit to develop the remaining 12.5 acres. The court refused to include the 38.5 acres as part of the denominator because that land had no value to the plaintiffs. Thus, the court concluded that only 12.5 acres would be considered as the denominator, and that because the value

was de minimus, the owner was deprived of all economically feasible use of the property and was entitled to just compensation. Loveladies Harbor, supra, pp. 1181-1182.

In Volkema, the Court employed the same "factual nuances" analysis, but reached a different conclusion. The plaintiffs in Volkema, bought 45 acres of commercial property in 1963 and a contiguous five-acre parcel in 1979. The plaintiffs developed the property and were left with 24.6 acres at the time of the litigation. The plaintiffs sought a permit to fill 4.3 acres of wetlands, but that permit was denied. The plaintiffs sought compensation for the six acres they claimed were rendered useless

because of the denial of this fill permit.

This Court held that it would not include the entire 45 acres as the denominator because approximately half of that land was developed before enactment of the WPA. However, this Court held that it would consider the remaining 24.6 acres as the denominator, rather than the six acres as urged by the plaintiffs. In Volkema, the entire 24.6 acres was of high value to the plaintiffs, and the land, when viewed as a whole, continued to have substantial value because it could still be developed for commercial purposes. Thus, this Court concluded that the plaintiffs had suffered no taking where a majority of the land could be

developed for commercial purposes. Volkema, supra. p.74.

In the present case, the Court of Claims properly considered only the 55 acres of parcel 1. Parcels 2, 3, and 4 are zoned for residential purposes, while parcel 1 is zoned for commercial uses. Parcel 3 was developed before plaintiffs first applied for the permit. Parcels 2 and 4 are not developed. Because of the differences in zoning of the four parcels and the differences in ownership, we conclude that the Court of Claims' factual finding that the 55 acres should be considered as the denominator is not clearly erroneous.

D.

Defendant next contends, however,

that even in light of the regulation, there was no taking because the property retained significant value. The Court of Claims found that parcel 1, as regulated by the permit denial, was essentially worthless as commercial real estate. This factual finding is not clearly erroneous based on the evidence presented at trial.

The Court of Claims credited the testimony of plaintiffs' experts who concluded that the property was essentially worthless. The Court of Claims discounted the conclusion of the defendant's expert that the edges of the parcel could still be developed, because that conclusion was refuted by plaintiffs' experts. We note that the 28 acres of wetlands is irregularly shaped

within the 55-acre parcel. Thus, it is not possible to simply leave the wetlands area undeveloped and build on the remaining 27 acres. If the 28 acres of wetlands was not developed, the only area that could be feasibly developed would be the edges of the area of parcel 1. This was apparently not economically feasible because of the land needs for a restaurant, including parking lots. Thus, this case is unlike Volkema because there the plaintiffs could still use the remaining 18 acres of the 24 acres of property. Here, the plaintiffs could not develop the remaining 27 acres because of the configuration of the wetlands within the parcel.

Accordingly, the Court of Claims did

not err in concluding that the regulation in this case denied the owners of all economically beneficial or productive use of the land. Thus, a taking occurred within the meaning of the Fifth Amendment and plaintiffs were entitled to just compensation for the 55 acres of land affected by the regulation.

III.

Defendant next argues that the Court of Claims erred in rejecting its option to cure the taking by permitting implementation of the "Goga Plan."

Plaintiffs first submitted an application on May 28, 1988 regarding development of parcel 1. On November 7, 1988, defendant denied a permit to develop the property because 28 acres of

the parcel was determined to be protected wetlands. Plaintiffs then filed their complaint on December 29, 1988. Thereafter, William Goga, a civil engineer retained by plaintiffs, developed a mitigation plan. He proposed that some wetlands be filled in parcel 1, but that wetlands could be created in the parcel out of non-wetland area. This plan was submitted to defendant in April 1990. Defendant rejected this plan after its submission and denied a permit application based on Goga's plan in July 1990.

Trial in this matter was held on December 17, 1991. On November 5, 1992, the Court of Claims issued its opinion and order finding that a taking had

occurred because plaintiffs were denied all economically beneficial or productive use of the land because of the permit denial. It was not until after this determination that defendant agreed to accept the Goga Plan. The Court of Claims issued a second opinion and order, dated May 4, 1993, which mainly dealt with various compensation issues. The Court of Claims specifically found that defendant was entitled to accept the Goga Plan pursuant to MCL 281.721(3)(c); MSA 18.595(71)(3)(c). This provision specifically allows defendant to modify its action so as to minimize the detrimental effect to the property's value after the court determined that defendant's action constituted a taking.

The Court of Claims found to objection to this approach. The Court of Claims then stated that those portions of the property defined as being part of the Goga Plan may be exempted from the taking, while those portions that were to be transformed into wetlands would be considered to be condemned.

In considering what constituted just compensation, the Court of Claims ruled that plaintiffs would be awarded interest and fair market value of the portion of land actually condemned. The court specifically did not include that portion of the land that could still be commercially developed under the Goga Plan. Thus, defendant's characterization of the Court of Claims action as being a

rejection of defendant's decision to accept the Goga Plan is not supported in the record.

Further, we cannot agree with defendant's contention that its decision to offer a permit for the Goga Plan eliminates the taking. The Court of Claims found, and we agree, that there was an unconstitutional taking in this case due to the regulation of the wetlands area. It was not until after a finding by the Court of Claims that defendant decided to accept implementation of the Goga Plan. However, this action does not eliminate a taking. As the Court of Claims correctly determined, 27 acres of the parcel were temporarily taken and 28 acres were

permanently taken.

In First English Evangelical Lutheran Church of Glendale v. Los Angeles Co., 482 U.S. 304, 321, 107 S.Ct. 2378; 96 L. Ed. 2D 250 (1987), the Supreme Court held that where the government's activities have created a taking of all use of property, so subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Such "temporary takings" are also entitled to just compensation.

Therefore, we find that the Court of Claims did not err in awarding compensation. The court properly found that there was a temporary taking

concerning part of the land and a permanent taking concerning the remaining portion of the land. Thus, the court's order awarding compensation complied with MCL 281.721(4); MSA 18.595(71)(4) in that it found a temporary taking concerning part of the land that could be developed under the Goga Plan.

IV.

Next, defendant contends that the trial court erred in finding MCL 281.721(4); MSA 18.595(71)(4) unconstitutional in that it violated the just compensation clause of the Fifth Amendment and Const. 1963, art. 16, § 2.

The Court of Claims did not err in finding § 21(4) is unconstitutional because it limits plaintiffs recovery to

twice the state equalized value of the property taken. Both the federal and state constitutions provide that private property cannot be taken for public use without just compensation. Just compensation means the full monetary equivalent of the property taken. Abttota Farmers Elevator & Warehouse Co. v. Unites States, 409 U.S. 470, 473; 93 S. Ct. 791; 35 L. Ed. 2D 1(1973). Just compensation is that amount that places a property owner in a condition as good as the owner would have been had the taking not occurred. Id.; Oakland Hills Development Corp. v. Lueders Drainage District, 212 Mich. App. 284, 292-293; 537 N.W.2d 258 (1995).

The determination of the measure of

just compensation for a taking is a judicial, not a legislative, question. United States v. Sioux Nation of Indians, 488 U.S. 371, 417 n.30; 100 S.Ct. 2716; 65 L.Ed. 463 (1980), citing Monongahela Navigation Co. v. Unites States, 148 U.S. 312, 327; 13 S.Ct. 622; 37 L.Ed. 1209 (1936). Because the determination of the proper measure of compensation for a taking is solely a judicial question, the legislature may not restrict the measure of just compensation in a takings case. Baltimore & Ohio Railroad Co. v. Unites States, 298 U.S. 349; 368; 56 S. Ct. 797; 80 L. Ed. 1209 (1936). Thus, statutes that set forth the compensation rate for a taking, such as MCL 281.721(4); MSA 18.595(71)(4), are unconstitutional. See

Baltimore and Ohio, supra; Monongahela, supra.

Because MCL 281.721(4); MSA 18.595(71)(4) mandates the method of computing just compensation for a taking, the Court of Claims correctly held that it is unconstitutional.

V.

Last, defendant argues that the Court of Claims awarded excessive damages for the taking. We disagree.

The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. Miller Bros, supra, p. 685. The public must not be enriched at the property owners' expense, but neither should

property owners be enriched at the public's expense. Id. There is no formula or artificial measure of damages applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented. Poirier v. Grand Blanc Twp, after remand, 192 Mich. App. 539, 543; 481 N.W.2d 762 (1992).

In avoiding windfalls to property owners, the nature of the taking must be considered. Where there is a temporary taking, the just compensation awarded must reflect its temporary nature. Miller Bros, supra. p. 687. This Court has recognized that money damages are

recoverable for a temporary, unconstitutional taking. Courts should engage in a flexible approach in determining compensation for a temporary taking. Some factors to consider include: rental return, option price, interest on lost profit, before and after valuation, and benefit to the government. Poirer, supra, p. 544-545.

The Court of Claims awarded $3,245,256, plus interest of $1,574,522.60 for the property taken. The Court of Claims also awarded $459,400 for the temporary use of the property. The court's award of damages is based on the evidence presented and does not appear to be an abuse of discretion. In this case, because of the difficulty in determining

the fair market value of the land with the use restrictions placed on it, the court appeared to engage in a flexible approach in computing damages. Defendant has not shown that the Court of Claim's computation of damages was erroneous or excessive.

Affirmed.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN SUPERIOR COURT

C.A. CO. 87-1077

MARY E. LEONARD

V.

TOWN OF BRIMFIELD, ZONING BOARD OF APPEALS

FINDINGS, RULINGS AND ORDER OF JUDGMENT

The plaintiff owns sixteen acres of land lying between the Quaboag River and Dunhamton Road in Brimfield, Massachusetts. The area is zoned a Flood Plain Zone. It is shown on Exhibit 5, Plan of the land by Smith Associates, march 1987, which divides the land into

four lots. The house which the plaintiff proposed to build is shown on lot 12B on that plan. The plan has not been recorded in the registry. The Brimfield building inspector granted a building permit dated March 30, 1987 for a single family house. Then in an April letter he revoked the permit for the reason that a permit in a Flood Plain Zone required a finding by the Board of Appeals that the use would not endanger the health or safety of the occupants thereof.

Mary Leonard then filed a request for a special permit on or about April 13, 1987. By a decision dated June 2, 1987, the Board granted the request but limited construction to land at and above the 370' elevation mark. The plan of the

land by Smith Associates dated March 1987 (Exh.5), prior to her request for a permit, placed the house at a point which was at an elevation of 370 feet or higher. The top of the well installed by Mary Leonard, seen by the court on a view, was within 50 feet of Dunhamton Road at an elevation of 368 feet.

The 100 year flood zone would indicate flooding from the Quaboag river would bring water onto the property up to the elevation of 360 feet. A neighbor, Demers, who testified indicated that the 1955 flood covered Dunhamton Road at the southern end of the property , and he drew a pencil on Exhibit 5 where he recalled the flood waters from the 1955 flood to have reached. Exhibit 10 showed

the position on the property of the 360' line, 100 year flood, and the 365' line, the 500 year flood. The line drawn by witness Demers would come close to the top of the well as shown on that plan.

In an appeal from the decision of the zoning board of appeals, the court's function is to determine de novo whether there was adequate basis for the board's decision and to see that it was not made on legally untenable basis, was not arbitrary or capricious, and made for some legally impermissible reason. If the reasonable minds differ as to the issuance of a permit, it is the boards' decision that will govern, not the court's. Kinchla v. Planning Board of Assessors of Falmouth, 11 Mass. App. Ct.

927 (1981). See Garvey v. Board of Appeals of Amherst, 9 Mass. App. Ct. 856 (1980); Malcomb v. Board of Appeals of Southborough, 361 Mass. 887 (1972).

The Superior Court in reviewing the board's decision may consider only the evidence which formed the basis of the board's action. See McDonald's Corporation v. Town of East Longmeadow, 25 Mass. App. Ct. 904, 905 (1985) (rescript). The court cannot substitute its judgment of that of the Board. McDonald's Corporation v. Board of Selectmen of Randoph, 9 Mass. App. Ct. 830, 832 (1980) (rescript).

I find that the plaintiff has not demonstrated by a fair preponderance of the evidence that the Board's decision

was out-side the scope of its authority and should be annulled, or that there was not adequate basis for the Board's decision. I therefore affirm the decision of the Brimfield Zoning Board of Appeals and dismiss the appeal.

_____

William H. Welch
Justice of the Superior Court

Entered: October 19, 1987.

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

(2)

No. 96-389

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARY E. LEONARD

Petitioner,

vs.

TOWN OF BRIMFIELD and CYNTHIA K.POWERS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts correctly determined that Petitioner Mary Leonard, who purchased an undivided piece of land subject to long-standing zoning regulation through a local zoning by-law, did not suffer a compensable "taking" under the Fifth Amendment to the United States Constitution where the Town of Brimfield Zoning Board of Appeals imposed a condition upon its grant of a special permit to Leonard, allowing her to build a residence upon part of her still undivided property, and it was undisputed that the remainder of her property could be used for agricultural, horticultural, and recreational purposes.

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I. This Case Presents A Poor Vehicle For Review Of The Question Presented Because The Petition, At Best, Merely Contests The Supreme Judicial Court's Application Argued By Leonard To Factual Determinations Made At Trial And Upheld On Appeal. 10

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A. The Michigan Court of Appeals decision relied upon by Leonard is not a decision of a state court "of last resort" and, in any event, does not conflict with the decision of the Massachusetts Supreme Judicial Court. 14

B. Because Leonard has not challenged the legal standard applied by the Supreme Judicial Court, and because factual deficiencies in the record preclude any

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result other than that reached by the Supreme Judicial Court, any opinion issued by this Court on the merits would constitute an impermissible advisory opinion. 17

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APPENDIX

Appendix A - Excerpts From the Record Appendix . . 1a

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional provisions referenced by Petitioner in her Petition for a Writ of Certiorari, the Respondents rely upon the following authorities:

Michigan Constitution, Article VI, Section 1, which provides:

Judicial power in court of justice; divisions. Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected and serving in each house.

Mass. Gen. L. ch. 40A, §17, which provides, in pertinent part:

Any person aggrieved by a decision of the board of appeals or any special permit granting authority...may appeal to the land court department, [or] the superior court department in which the land concerned is situated...by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.***

Mass. Gen. L. ch. 41, §81P, which provides, in pertinent part:

Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed by [Mass. Gen. L. ch. 41,] section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon...the words "approval under the subdivision control law not required"...and such endorsement shall be conclusive on all persons.***

Section VI-C of the Brimfield Zoning By-law in effect at the relevant times of this action, which provides that:

1. In a Flood Plain District, uses otherwise permitted as set forth in Section IV-A through IV-B above may be authorized after a finding by the Board of Appeals, after a hearing with due notice given, that said use will not endanger the health or safety of the occupants thereof.

STATEMENT OF THE CASE

A. Procedural History

This petition for writ of certiorari arises out of one of three cases brought by Petitioner Mary Leonard [hereinafter "Leonard"] against the Respondent Town of Brimfield

[hereinafter "Town"].[1] Those cases are:

1. *Mary E. Leonard v. Town of Brimfield*, Hampden Superior Court C.A. No. 87-592 (filed April, 1987). This case alleged that the Town maintained multiple culverts which discharged unreasonable and unnaturally large volumes of water onto Leonard's property, thus resulting in a nuisance. This case was settled by agreement of the parties in consideration of $60,000.00, with a Release granted by Leonard to the Town (Record Appendix at p. 19-20 [hereinafter "R.A. _____"][2]; see also Petitioner's Appendix at p. A3-A4 [hereinafter "Pet. App. __"]).

2. *Mary Leonard v. Brimfield Zoning Board of Appeals*, Hampden Superior Court C.A. No. 87-1077 (filed April, 1987). This case appealed as unlawful, arbitrary and capricious the June 2, 1987 decision of the Brimfield Zoning Board of Appeals granting a Special Permit with conditions, allowing Leonard to build above the 370 foot-elevation line. After a jury waived *de novo* trial held on October 6-7, 1987, the superior court affirmed the Board's decision. (R.A. 40-42). Leonard appealed to the Massachusetts Appeals Court, which affirmed the lower court's decision, 27 Mass. App. Ct. 1408 (1989). (R.A.

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[1] Cynthia Powers, the other named Respondent, is only nominally considered as part of the Petition for Writ of Certiorari and the challenged state court decision.

[2] For this Court's convenience, all Record Appendix references are reprinted in "Appendix A," *infra*, with the exception of the Town of Brimfield Zoning Map, contained at R.A. p. 177.

165; Pet. App. A3). Further appellate review was denied by the State's highest court, the Massachusetts Supreme Judicial Court, on August 17, 1989, 405 Mass. 1204 (1989). (R.A. 165; Pet. App. A3).

3. *Mary E. Leonard v. Town of Brimfield and Cynthia K. Powers, Individually and as Chairperson of the Brimfield Conservation Commission*, Hampden Superior Court C.A. No. 87-1238 (filed July, 1987). This case alleged that the Town's enforcement of its zoning by-law effected a "taking" of Leonard's land, and violated her civil rights. After trial, the superior court found in favor of the defendants (R.A. 163-168; Pet. App. A6), and Leonard appealed to the Massachusetts Appeals Court. (R.A. 179). The Supreme Judicial Court transferred the case from the Appeals Court on it own initiative, and rendered a decision on July 11, 1996 (Pet. App. A1), affirming the trial court's decision in favor of the Town. Leonard then filed this petition for writ of certiorari.

B. The Record Below

Upon review of Leonard's Petition, it is evident that her real complaint lies, not with the Supreme Judicial Court's decision but with her own failure at trial to introduce sufficient evidence to support her claims. In an effort to create an appellate issue, Leonard relies upon a series of factual allegations in her petition that simply are not part of the record below, were not adduced at trial in the underlying case, and cannot provide a basis for review by this Court.

Background Facts

In 1986, Leonard purchased an approximately 16-acre lot located in Brimfield, Massachusetts (R.A. 59-60), in an area zoned as the "Flood Plain District" as noted on the Town of Brimfield's Zoning Map. (R.A. 172, 177). Under Brimfield Zoning Bylaw Section VI-C (Flood Plain Restrictions), no building permit could issue without Leonard first obtaining a special permit from the Brimfield Zoning Board of Appeals [hereinafter "ZBA"]. (R.A. 171, 175). Leonard applied for a building permit from the Building Inspector, and in fact received such a permit, but it was later revoked when the Building Inspector determined that the property was located in the Flood Plain District. (R.A. 171-172).

Leonard accordingly applied to the ZBA for a special permit (R.A. 171, 175), and after a public hearing held on May 4, 1987, the ZBA granted Leonard a special permit, with conditions [hereinafter "the ZBA's June 2, 1987 Special Permit"]. (R.A. 164, 175-176). The ZBA made specific findings of fact, including that Leonard's lot had an elevation of 360 feet (above sea level) in the vicinity of the river, to approximately 400 feet at the most northeasterly corner of the lot, with a large portion of the lot lying at elevations of 360 to 365 feet. (R.A. 175). Within this area of 360-365 foot elevation, the ZBA determined that extensive wetlands existed. (R.A. 175). The ZBA further found that flood crest levels of the river would create a hazard at the 360-365 foot elevation, and that septic systems located at this elevation would be rendered useless at flood

crest levels and most likely would contribute pollutants to the environment. (R.A. 175). Finally, the ZBA noted that the domestic water supply would be threatened at flood crest levels and due to septic system failures. (R.A. 176).

Based upon these findings, the ZBA determined that building within the 360-365 foot elevation area would endanger the health and safety of the occupants, affect the environment, and possibly endanger neighboring inhabitants. (R.A. 175). Despite the potential harm posed, the ZBA felt that prohibiting property use for the entire property would be "extreme and unfair" to Leonard. (R.A. 176). Therefore, the ZBA *granted* Leonard a special permit, conditioning the approval upon the restriction that construction on the property be limited to land located at and above the 370-foot elevation mark, a five-foot safety factor from the 360-365 foot elevation. (Pet. App. A3; R.A. 176). Approximately 6 acres of the 16-acre lot were available for building. (Pet. App. A3). Leonard built her house on the property within that portion of the land above the 370-foot elevation mark. (*See, e.g.*, Pet. App. A13; R.A. 93).

Leonard first appealed the ZBA's decision as "discriminatory, unreasonable, and arbitrary," to the Hampden County Superior Court, pursuant to Mass. Gen. L. ch. 40A, §17 (*see* Procedural History, Section A.2, above). (R.A. 40-42, 165). After trial, the judge upheld the ZBA's decision. (R.A. 40-42). Leonard then appealed the trial court's decision to the Appeals Court, which affirmed the lower court's ruling, 27 Mass. App. Ct. 1408

(1989). (R.A. 165). Further appellate review was denied by the Supreme Judicial Court on August 17, 1989, 405 Mass. 1204 (1989). (R.A. 165). Following the exhaustion of these appeals, Leonard built her house on that portion of the lot located above the 370-foot elevation mark. (R.A. 93).

At the same time she was appealing the ZBA's decision, Leonard filed two other actions in Hampden County Superior Court, as previously noted. One of these actions was settled by the parties (*see* Procedural History, Section A.1, above), and the second action (*see* Procedural History, Section A.3, above), forms the basis for the present Petition for Writ of Certiorari.

Factual and Legal Mischaracterizations

Perhaps the best way to identify the numerous mischaracterizations of fact and law Leonard makes in her Petition is to emphasize what this case does not involve. First, this case is not about the Town's (ZBA's) purported "decision to enforce a one thousand (1,000) year flood plain zone." (Petition at 3-4, 7). Leonard concedes that the validity of the ZBA's June 2, 1987 Special Permit "is not at issue." (Petition at 25). Nor could it be, as the doctrine of *res judicata* bars Leonard's efforts at this stage to relitigate the propriety of the ZBA's actions. The legal validity and enforceability of the ZBA's June 2, 1987 Special Permit was affirmed by three competent reviewing courts, through to the Massachusetts Supreme Judicial Court [hereinafter "SJC"], which, as noted, denied further appellate review on

August 17, 1989.

Moreover, the record evidence does not support, even marginally, Leonard's bare assertion that the ZBA imposed a "one thousand (1,000) year flood plain zone for the first time, and required a special permit to build in this flood plain (at any elevation) for the first time...." (Petition at 25). There is *no* evidence on the record that the 370-foot elevation mark represents a one thousand year flood plain zone, and Leonard has pointed to no such record evidence (*see, e.g.*, Petition at 7-8 n.4), except her own extrapolation on appeal, that if 360 feet represents the 100 year flood plain and 365 feet represents the 500 year flood plain, then 370 feet must represent the 1,000 year flood plain. There is simply no evidence on the record to support this presumption. There is no evidence from the record below that any witness provided the engineering, geological, or topographical foundation for such an extrapolation. The record below does not even contain a simple statement by any witness that the 370-foot elevation represents the 1,000 year flood plain. Perhaps more tellingly, even Petitioner's *complaint* and *pre-trial memorandum* fail to identify a 1,000 year flood plain zone. (R.A. 3-9, 10-16).[3]

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[3] Leonard herself is not consistent on the issue of what a 370-foot elevation represents. In some instances, such as in her petition, she contends that it is equivalent to a 1,000 year floor plain. In others, such as her pre-trial memorandum (R.A. 13-14), Leonard asserts that it is equivalent to a 1,200 year flood plain. Finally, in her complaint, Leonard merely states that the 370-foot elevation resulted in a flood plain zone that "substantially exceed[ed]" the 500 year flood plain. (R.A. 4).

This case also does not involve multiple subdivided lots. (Petition at 4-5, 9-10). The trial record clearly establishes that Leonard had not filed with the Brimfield Planning Board a plan subdividing her land, as required under Mass. Gen. L. ch. 41, §81P, at the time she applied for a special permit. (Petition at 5; Pet. App. A12). The property was therefore undivided at all relevant times to her claim: at the time she petitioned the ZBA for a Special Permit (May 4, 1987); at the time the ZBA issued its Special Permit (June 2, 1987); and at the time she commenced the instant suit (July 8, 1987) (R.A. 9). The trial judge properly made a *factual* determination that at the time Leonard commenced this underlying lawsuit, "the subject property was a single 16-acre lot and the [Petitioner] had taken no action to subdivide her property." (Pet. App. A24). This determination was upheld by the SJC as supported by the record. (Pet. App. A12).

Finally, as stated above, this case is not about an error of law by the SJC in applying a takings analysis under federal law. That court, in fact, adopted completely Leonard's version of federal case law, and her proffered legal analysis (the so-called "three-pronged test"). *Cf.* Brief of Mary E. Leonard, p. 22, *et seq.* and SJC's analysis, Pet. App. A8.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW OF THE QUESTION PRESENTED, BECAUSE THE PETITION, AT BEST, MERELY CONTESTS THE SUPREME JUDICIAL COURT'S APPLICATION OF THE LEGAL STANDARD ARGUED BY LEONARD TO FACTUAL DETERMINATIONS MADE AFTER TRIAL AND UPHELD ON APPEAL.

A. Under The Supreme Court's Rules, A Writ Of Certiorari Is Rarely Granted Where The Error Asserted Consists Of Erroneous Factual Findings Or Misapplication Of A Properly Stated Rules of Law.

Rule 10 (last ¶) of the Rules of the Supreme Court provides that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, Petitioner challenges exactly what the Supreme Court has cautioned will *not* be generally considered appropriate for certiorari review: factual findings and the Massachusetts Supreme Judicial Court's application of a standard proffered by Leonard herself. The Petition for Writ of Certiorari should therefore be denied.

B. Leonard Does Not Challenge The Standard Of Review Applied By The SJC, But Only Its Application To The Facts.

The three factors discussed by the SJC in determining whether a compensable taking had occurred were the same three factors argued by Leonard as the appropriate standard of review in takings claims under federal law. *See* Brief of the Plaintiff-Appellant, at p. 13, *Leonard v. Town of Brimfield, et al.*, 423 Mass. 152 (1996) (No. SJC-07008). Specifically, the SJC addressed the "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" (Pet. App. A8). Leonard does not challenge that standard here. (Petition at 16).

Rather, what Leonard really argues is that the SJC misapplied her own proffered "standard" and made erroneous factual findings against her. For instance, the SJC applied the "distinct investment-backed expectations" prong proposed by Leonard, and concluded that on the facts, her expectations were not reasonable, because they were made without considering the pre-existing zoning restrictions on the property. (Pet. App. A9-A14). *Accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Implicit in the SJC's determination is the fact that the *record evidence was insufficient* to show that any economic impact Leonard allegedly suffered was severe. (Pet. App. A9-A14). Any analysis of the SJC's

decision will therefore be a fact-bound determination, requiring extensive examination of the record below. Thus, this case presents a poor vehicle for analyzing the question presented. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-112 (1980) (Supreme Court customarily accepts factual findings of state courts in the absence of "exceptional circumstances") (citing *Lloyd A. Fry Roofing Co., infra*). A petition for a writ of certiorari should not be granted where, as here, the asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law. Supreme Ct. R. 10.

Should the Court accept this case for review, it would find that the record cannot support a finding that a compensable taking occurred. This would be particularly evident on the essential fact questions regarding valuation of the subject property. Assuming *arguendo* that Leonard's investment backed expectations were reasonable in light of the preexisting zoning restrictions, the record contains no comparative "before and after" valuation evidence from which a reviewing court could determine the economic impact of the ZBA's June 2, 1987 Special Permit. The only valuation evidence to be found in the record is trial testimony from Leonard's expert about the supposed value of subdivided building lots. The record is fatally silent about whether this supposed value is greater than, or less than, the agricultural, horticultural or recreational alternatives. In fact, there is no record evidence to support even a finding that Leonard's inability to build on certain portions of the property due to the 370 foot elevation

restriction decreased the value of the property, in light of the other available uses listed above. It will, therefore, be impossible for any reviewing court to reach any supportable conclusions about the economic impact upon Leonard, if any, of the ZBA's June 2, 1987 Special Permit.

This lack of evidence was recognized by the SJC, which stated in its decision: "the evidence was insufficient to show that the economic impact was severe." (Pet. App. A13). Leonard's failure of proof at the trial level presents an incurable flaw to the worthiness of this case for certiorari review, and this Court should deny Leonard's Petition.

Finally, Leonard contends that the ZBA's actions "should be deemed a 'taking' because it was *discriminatory*...." (Petition at 27 [emphasis added]). In her argument, Leonard suggests, without any supporting citation to the record, that the present case "was the first time that Brimfield enforced its flood plain zone." (Petition at 24). Regardless of whether this assertion has any relevance to a takings analysis, the issue was not fully or properly developed on the trial record, as indeed it should not have been pursuant to the doctrine of *res judicata*. The claim that the ZBA's June 2, 1987 Special Permit was arbitrary, capricious or discriminatory had previously been litigated through to a final conclusion. (*See* Procedural History, Section A.2, above; *see also* Pet. App. A70-A75). Leonard's efforts to color in that fashion the trial below were properly objected to as being barred by the doctrine of *res judicata* and sustained by the trial judge. (*See, e.g.* R.A. 109-110). Furthermore, the SJC correctly noted in its

decision that "the validity of the Board's enforcement of this zoning by-law has been adjudicated." (Pet. App. A7). Should this Court grant Leonard's certiorari petition, it would find that, as is also the case with the question of proving severe economic impact, the determination of discriminatory effect upon Leonard would be at best an exhausting fact-bound exercise, and at worst, a task made impossible by the incompleteness of the record. This case is a completely inappropriate vehicle for the question presented, and accordingly, the Court should deny Leonard's Petition.

II.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO IDENTIFY AN APPELLATE ISSUE OF SUFFICIENT GENERAL IMPORTANCE TO JUSTIFY THE GRANT OF CERTIORARI.

A. The Michigan Court Of Appeals Decision Relied Upon By Leonard Is Not A Decision Of A State Court "Of Last Resort" And, In Any Event, Does Not Conflict With The Decision Of The Massachusetts Supreme Judicial Court.

Rule 10 of the Rules of the Supreme Court provides that a petition for writ of certiorari will only be granted for "compelling reasons." In considering whether to grant certiorari, this Court considers whether "a state court *of last resort* has decided an important federal question in a way that conflicts with the decision of *another state court of last*

resort ... Supreme Ct. R.10(b) [emphasis added]. Apparently in an effort to fit within this provision of the Rules, Leonard proffers a Michigan Court of Appeals decision, *K&K Construction, Inc., J.F.K. Company, and Resorts and Company v. Department of Natural Resources and Michigan Association of Home Builders*, 217 Mich. App. Ct. 56 (1996), which she claims "directly conflicts with the reasoning of the Massachusetts [Supreme Judicial] Court ...." (Petition at 12). This argument is both irrelevant and unpersuasive.

First, it is plainly irrelevant because the Michigan Court of Appeals is *not* the court of "last resort" in the State of Michigan. Michigan Constitution, Article VI, §1. In fact, the Clerk's Office for the Michigan Supreme Court has advised that an application for leave to appeal this decision is currently pending before the Michigan Supreme Court. A copy of the cover page of the Application for Leave to Appeal is included in the Town's "Appendix B," *infra*. This Court should not exercise its discretion and expend limited judicial resources to review a case which cannot even reach the threshold showing of a reviewable conflict.

Secondly, Leonard's argument is unpersuasive because even if the decision were from Michigan's court of last resort, the decision on its face does not conflict with the SJC's decision in one critical respect. In *K&K Construction*, the Michigan Court of Appeals addressed a takings claim where the trial court made a factual determination that the property at issue was rendered "essentially worthless as commercial real estate" by

restrictions under the Michigan Wetlands Protection Act. (Pet. App. A35; *see also* 27 Mich. App. Ct. at 60). Determining that this factual finding was not clearly erroneous, the *K&K Construction* court analyzed the takings issue pursuant to both federal and state authorities in which a claimant was denied all economically viable (or beneficial or productive) use of the property as a result of governmental regulation. (Pet. App. A39-A40, A55; *see also* 27 Mich. App. Ct. at 61-62, 68-67).

In contrast, the SJC decision challenged herein did not involve or establish a deprivation of all "economically viable" or "economically beneficial or productive" use of Leonard's property. The record indicates that Leonard was allowed to build a house on her property, and additionally, that the entire property is suitable for agricultural, horticultural and recreational purposes, and in fact, had been used for agricultural purposes prior to Leonard's purchase of the land. (R.A. 93-94; *see also* Pet. App. A13). Furthermore, as noted earlier, it cannot even be established from the record whether those viable alternative uses were of greater or lesser value to Leonard.

This is a critical distinction because if the Court wishes to review claims for takings damages in instances of less than a total "deprivation of all economically feasible use," *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016-1017 n.7, this case is not the appropriate vehicle to do so. Because the facts are totally distinguishable on the key point, the Michigan Appeals Court and Massachusetts SJC decisions do not present clear

conflicting issues of federal law ripe for review by this Court.

B. Because Leonard Has Not Challenged The Legal Standard Applied By The Supreme Judicial Court, And Because Factual Deficiencies In The Record Preclude Any Result Other Than That Reached By The Supreme Judicial Court, Any Opinion Issued By This Court On The Merits Would Constitute An Impermissible Advisory Opinion.

As discussed above (Section I., *supra*), Leonard has not challenged the legal standard articulated by the SJC in its analysis of the regulatory takings claim, and in fact was the party who proffered this standard on appeal from the trial court's decision. Brief of the Plaintiff-Appellant at p. 13-14, *Leonard v. Town of Brimfield, et al.*, 423 Mass. 152 (1996) (No. SJC-07008). Furthermore, also as discussed above, Leonard failed to adduce sufficient evidence at trial to support her takings claim, under *either* the standard of review applied by the trial court or by the SJC. Leonard essentially asks this Court to readjudicate the factual findings of the trial court, which this court should not do except in exceptional circumstances. *See Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925) [citations omitted]; *Portland Ry. Co. v. Railroad Commission of Oregon*, 229 U.S. 397, 412 (1913). (the Supreme Court will not generally reexamine state court findings and conclusions of fact). As this Court has plainly stated: "We do not grant certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). Leonard's petition asks the Court to do just that, and it should therefore be denied.

Should this Court grant certiorari, it will be called upon to render in substance an advisory opinion. It is well established that the Supreme Court's power is to "correct wrong judgments, not to revise opinions." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). In construing its own authority, this Court has noted that "[w]e are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.* Leonard's petition seeks just this. Leonard calls upon the Court to apply the same "three-pronged test" which she advocated below and which was accepted by the SJC to a factual record which, because she so improperly and incompletely developed it at trial, could only serve to support the SJC's decision. Leonard's Petition for a Writ of Certiorari should be denied.

III.

LEONARD'S EFFORTS TO RE-LITIGATE THE FACTUAL FINDINGS OF THE LOWER COURT WITHOUT A SUBSTANTIAL BASIS FOR APPELLATE REVIEW BY THIS COURT RENDERS THIS A FRIVOLOUS APPEAL.

Rule 10 of the Rules of the Supreme Court provides that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Leonard was successful in persuading the SJC to adopt the "three-pronged test" which she proffered, but she could not muster the facts to get the ultimate result she desired. Her petition falls squarely into the category rarely granted under Rule 10.

Her petition also is frivolous because she flatly failed to establish any conflict within the meaning of Rule 10(a)-(c). The Michigan Court of Appeals is not a court of "last resort" within the meaning of the Rule, and the case Leonard relies upon is currently pending before Michigan's Supreme Court. Even if the Michigan decision had reached a court of "last resort," the two decisions are so factually distinguishable on the key inquiry in regulatory takings analysis - the extent of economic deprivation - that they still present no meaningful conflict. Leonard's representation or implication to the contrary is without merit. If there were other "compelling reasons" for accepting this case for review, Leonard has failed to identify them.

Finally, Leonard's petition is frivolous because it is nothing more than a transparent attempt to re-litigate her failed "1,000 year flood plain" crusade, which was long ago properly laid to rest. In an apparent attempt to gain the sympathy of this Court, Leonard riddles her Petition with references to the so-called "1,000 year flood plain," a reference which is unsupported by the record below, about which she herself has been factually inconsistent, and which she *concedes* in her Petition "is not at issue." (Petition at 25). This disingenuous tactic failed at the trial level. It also failed before the SJC. In light of these repeated failures and her concession that it is "not at issue," it is frivolous for Leonard to reincarnate her 1000 year flood plain crusade before this Court.

An appeal is frivolous if the result is obvious or the arguments advanced are wholly without merit. *See, e.g., Stelly v. C.I.R.*, 761 F.2d 1113 (5th Cir. 1985), *cert. denied*, 474 U.S. 851; *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283 (9th Cir. 1984). The Town has expended significant funds from the public fisc over the past nine years in successfully defending the ZBA's June 2, 1987 Special Permit, and Leonard's continued efforts to challenge the validity of the ZBA's action, disguised now as a takings claim, supports a finding that her Petition is frivolous. The Town, therefore, is entitled to its costs and any other "just damages" as determined by this Court pursuant to Rules 42 and 43 of the Supreme Court.

CONCLUSION

The Massachusetts Supreme Judicial Court correctly held that the Petitioner had not established a compensable governmental "taking" of property under the Fifth Amendment of the United States Constitution. Moreover, Petitioner has failed to identify an appellate issue worthy of consideration by this Court, as she seeks only to readjudicate factual determinations long since established by the Massachusetts trial court. Therefore, the Respondents respectfully request that this Court deny the Petition for a Write of Certiorari.

Respectfully submitted,

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APPENDIX A - EXCERPTS FROM THE RECORD APPENDIX [HEREINAFTER "R.A."][1]

[R.A. p. 3]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Hampden, ss: Superior Court Department
Springfield Division
Docket #87-1238

MARY E. LEONARD,

Plaintiff

v.

COMPLAINT

TOWN OF BRIMFIELD
and CYNTHIA K. POWERS,
Individually and as
Chairperson of the
BRIMFIELD CONSERVATION
COMMISSION,

Defendants

---

[1] Typographical errors contained in the Record Appendix are reproduced herein without correction or notation.

Appendix A

PARTIES

1. The Plaintiff, MARY E. LEONARD, is a resident of the Commonwealth of Massachusetts and resides at 16 Meadowbrook Lane, Town of Palmer, County of Hampden.

2. The Defendant, TOWN OF BRIMFIELD, is a town duly incorporated under the laws of the Commonwealth of Massachusetts.

3. The Defendant, CYNTHIA K. POWERS, is the Chairperson of the Brimfield Conservation Commission, and is a resident of Hampden County, residing on Monson Road, Brimfield, Massachusetts.

BACKGROUND

4. The Plaintiff, MARY E. LEONARD, is the owner of record of a [R.A. p. 4] parcel of property located on Dunhamtown-Palmer Road in the Town of Brimfield. Said property being more commonly known as Lot # 12 thereon. Further, said property is described as set forth in a deed recorded in the Hampden County Registry of Deeds, Book 6335, Page 120.

5. The Plaintiff, MARY E. LEONARD seeks to construct a single family dwelling on her property, others in similar circumstances have duly been permitted to built without interference from the Town of Brimfield. Plaintiff

says that a building permit #8726 was issued her on March 30, 1987 by Jack Keough, Building Inspector, Town of Brimfield. That the Defendant Cynthia K. Powers exercised undue influence such that said permit was revoked based upon Flood Plain zoning requirements. At all times relevant to this action she had knowledge that said zoning had not been enforced previously by the Town of Brimfield and thereon sought to have said zoning selectively, unreasonably, arbitrarily and discriminately enforced against the Plaintiff.

6. Plaintiff alleges that the building permit issued to her on March 30, 1987 was revoked as a result of such discriminatory, unreasonable, and arbitrary application of said poorly defined and previously unenforced zoning requirement. A copy of said revocation is attached hereto as Exhibit "A". Further, that the Defendant, Town of Brimfield, had actual knowledge that the discharge of great volumes of water onto the Plaintiff's land was illegally damaging the Plaintiff. This action has caused and continues to cause irreparable harm to the Plaintiff and substantial monetary damages.

7. Plaintiff states that the overlay boundaries of said zone substantially exceed the 500 year flood plain as established on the Flood Insurance Rate Map as established by the Army Corp of Engineers, hereinafter referred to as F.I.R.M., and said boundaries have neither been published nor previously applied to others similarly located pursuant to the issuance of building permits and/or special permits.

Appendix A

8. Plaintiff states as a result of the discriminatory enforcement [R.A. p. 5] of zoning by-law VI-C she was coerced into making application for a special permit. That after due application the Zoning Board of Appeals held hearings in compliance with M.G.L. Chapter 40A and its applicable sections. That on June 2, 1987 the Board issued a decision which had the effect of "substantially taking" a great part of the Plaintiff's land. Said "taking" ignores the F.I.R.M. standards and operates to deprive Plaintiff of the use of Lots C & B of Lot 12 for residential use.

9. The action of the Zoning Board of Appeals was appealed in the Hampden County Superior Court on or about June 17, 1987. Said appeal was duly served and alleges that the Board exceeded its authority as a matter of law and fact. See Exhibit "B" [Complaint] and Exhibit "C" [Decision of the Zoning Board of Appeals].

COUNT I

10 This Count alleges injuries to Realty Caused by Improvements not Constituting a Taking.

11 The Plaintiff realleges and incorporates by reference all the allegations made in Paragraphs 1 through 9 of the Complaint.

12. The Defendant, Town of Brimfield, through the maintenance of a culvert system has artificially channelled great amounts of water onto the Plaintiff's land. Said water

has caused injury to said land by creating a "wetland" area and thereby restricting certain building rights that the Plaintiff would otherwise enjoy.

13. The Plaintiff says that the Town of Brimfield has no easements upon her property which would allow for the artificial channelling of water onto her property.

Wherefore, the Plaintiff, pursuant to M.G.L.A. Chapter 79, Section 9, demands judgment that the loss, injury, and damage sustained by her on [R.A. p. 6] account of said acts, be inquired into, determined and ascertained, and that damages be assessed therefor, and that the trial for this Count for the assessment of her damages may be made by jury.

COUNT II

14. This Count alleges Damages for Injuries to Property caused by acts in Pais.

15. The Plaintiff realleges and incorporates by reference all the allegations contained in Paragraphs 1 through 13 of the Complaint.

16. The Defendant, Town of Brimfield, in pursuance of the decision of the Zoning Board of Appeal has effectuated a "taking" of the Plaintiff's lands. This "taking" while allegedly grounded upon health and safety considerations is primarily resultant from the Defendant's

illegal conduct in artificially channelling large volumes of water onto the Plaintiff's land.

17. At the time of said "taking" the land of the Plaintiff was free from all encumbrances.

18. Plaintiff further alleges said "taking" was undertaken in "bad faith" and is therefore invalid.

19. By reason of said acts of the Defendant, Town of Brimfield, the Plaintiff is deprived of the use of a large part of said land, and the value of the land has been greatly diminished, whereby the Plaintiff has suffered great damage.

WHEREFORE, the Plaintiff, pursuant to M.G.L.A. Chapter 79, Section 10, demands judgment that the loss, injury, and damage sustained by her on account of said acts of the Defendant, Town of Brimfield, be inquired into, determined and ascertained, and that damages be assessed therefor, and that [R.A. p. 7] the trial of this complaint for the assessment of her damages may be by jury.

COUNT III

20. The Plaintiff realleges and incorporates by reference all the allegations contained in Paragraphs 1 and 19 of the Complaint.

21. This Count alleges a claim under the Fifth Amendment, "Just Compensation Clause" of the United

States Constitution and made applicable to the State corporate body through the operation of the Fourteenth Amendment "Due Process Clause" of the United States Constitution.

22. Plaintiff alleges that the aforementioned "taking" is subject to the "Just Compensation Clause" of the Fifth Amendment of the United States Constitution and is applicable to the state municipal corporation [Town of Brimfield] through the operation of the "Due Process Clause" of the Fourteenth Amendment to the United States Constitution. That regardless whether said regulatory "taking" is temporary or permanent the Plaintiff is entitled to compensation.

Wherefore the Plaintiff, demands judgment for the temporary or permanent "taking" of of her land.

COUNT IV

23. This Count states a claim for the violation of the provisions of M.G.L.A. Chapter 12, Section 11 [I]

24. The Plaintiff realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 22 contained in the Complaint.

25. Plaintiff was originally informed that no building permit [R.A. p. 8] would be issued because of an unfavorable recommendation by the Town of Brimfield

Conservation Commission. See Exhibit "D" attached hereto. Said recommendation is not mandated by town by-law; thereon legal counsel for the Plaintiff sought the issuance of a building permit. On the advice of Town Counsel and action by the Board of Selectmen said permit was issued by the building inspector. Plaintiff alleges that thereafter Defendant, Cynthia K. Powers and members of the Conservation Commission entered into a joint venture and sought through coercion and intimidation to have the permit revoked pursuant to the discriminatory use of zoning restrictions.

26. The actions of the Defendant, its agents, employees and/or officials have interfered by such intimidation and coercion with the Plaintiff's use and enjoyment of her property as guaranteed by the Constitutions of the United States of America and the Commonwealth of Massachusetts and the general laws of the Commonwealth of Massachusetts all in violation of the provisions of M.G.L. Chapter 12, Sections 11 [H] [I].

WHEREFORE, the Plaintiff demands:

1. The Court permanently enjoin the Defendant, its agents, employees, and/or officials from discriminating and interfering with Plaintiff's rights to the enjoyment of her property as constitutionally protected.

2. That damages be assessed by the Court pursuant to the rights as set forth in M.G.L. Chapter 12, Section 11 [I] and that the Court further award costs of the

litigation and reasonable attorney fees thereon.

3. Such other relief as the Court shall deem necessary and proper.

THE PLAINTIFF
MARY E. LEONARD

[R.A. p. 9]

GREG T. SCHUBERT
Plaintiff's Counsel
Ten Mechanic Street
Worcester, MA 01608
[617] 798-2040

Dated July 8, 1987

Appendix A

[R.A. p. 10]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Hampden, ss: Superior Court Department
Springfield Division
Docket # 87-1238

MARY E. LEONARD,

Plaintiff

v.

TOWN OF BRIMFIELD and CYNTHIA K. POWERS, Individually and as Chairperson of the BRIMFIELD CONSERVATION COMMISSION,

Defendants

PLAINTIFF'S PRE-TRIAL MEMORANDUM

1. NATURE OF THE CASE

On or about June 30, 1986, the Plaintiff, Mary E. Leonard entered into purchase and sale contract with

Appendix A

Quaboag Valley Nursery Inc. for the purchase of approximately 16 acres of land located on the westerly side of Dunhamtown Road in the Town of Brimfield. The land was zoned residential/agricultural. At the time of the suggested sale, the property had been held in Chapter 61A status by the seller. The plaintiff, Leonard always intended to use the property for the construction of houses. She gave value for said property based on a residential usage. The property because of said status was subject to right of first refusal by the Town.

On December 2, 1986, the Brimfield Conservation Commission passed a motion to exercise the right of first refusal. See: Exhibit [R.A. p. 11] "A" attached hereto and incorporated by reference. Previously, Chairperson, Cynthia K. Powers, a defendant herein, had sought to procure this same land for the Quaboag River Watershed Association, Inc. She on two different occasions attempted to secure said land for alleged conservation purposes, This even after being rejected by the owners on the initial attempt and told they had no interest in dealing with governmental sales. Town counsel, Bruce Clarkin, by letter dated April 21, 1987, indicated that in his opinion the Watershed Association had a "financial interest" in the property bought by Leonard in July and August of 1986. Counsel further characterized the acts of Ms. Powers as that of an "employee" of the Watershed corporation. See: Exhibit "B" attached hereto and incorporated by reference.

Ms. Leonard prior to the purchase of the property had a title examination performed by Ellis Title Company of Springfield, Massachusetts. That title examination did not

reveal that the property was situated in a flood plain zone. The Town of Brimfield had failed to comply with the filing requirements in the Registry of Deeds as to the boundries or even the existence of said zone. Thereon, the plaintiff was not alerted to any zoning impediment existent on her property other than normal frontage and size requirements. Additionally, other single family dwellings existed along the westerly portion of Dunhamtown Road and at lower elevations on the easterly side of the road. As a result of the Town's failure to comply with state law, Ms. Leonard had no reason to believe that the land she was about to purchase was other than of a residential character. She purchased a modular kit home from a Canadian supplier. She procured builders for the erection of the house. Then she was informed of the flood plain zoning requirement. Seemingly, the flood plain zoning was available only on a map on the wall of the building inspector's office. Ms. Leonard will also offer evidence to prove that all the abutters and abutters to the abutters single family structures on [R.A. p. 12] Dunhamtown Road were never required to secure any variances or special permits pursuant to the flood plain zoning. She will further offer evidence that the building inspector, Jack Keough, even after notification by plaintiff's counsel, of violations under Chapter 40A, section 7 and Brimfield zoning By-Law VI-C failed to act against any property owner other than Ms. Leonard. Further evidencing discrimination, a request by the Brimfield Planning Board requesting the same exercise of police power against Ms. Leonard was immediately honored. See Exhibits "C" & "D" attached hereto and incorporated by reference.

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On March 21, 1987 the Conservation Commission knowing that the plaintiff did not consider the property to be a wetland and having no by-law obligation to consult the commission; [other than that "wetness" which was attributable to the Town's illegal water dumping onto the plaintiff's property] it nevertheless sought to impede the plaintiff's plan of commencing construction. This was accomplished through resort to police power zoning regulation. The dumping and/or illegal channeling of water from the culvert system then became the subject matter of Hampden County Superior Court docket number 87-592. A matter which was eventually settled between the parties for a sum of sixty thousand dollars. See: Exhibit "E" attached hereto and incorporated by reference.

On March 24, 1992, counsel for the plaintiff sent a letter under the provisions of Chapter 258, sections 4. See: Exhibit "F" attached hereto and incorporated by reference. The purpose of such letter was to comply with the Massachusetts Tort claims act pursuant to any **negligent** [emphasis added] acts of the Commission or its members. Service was had on Cynthia K. Powers, Chairperson, Br .nfield Conservation Commission. The appropriateness of this service is supported by **Ponchita v. Amherst-Pelham Regional School Committee**, 410 Mass 396, 572 N.E. 566, [1991]. Subsequent events however, showed this requirement inapplicable to the suit which is the [R.A. p. 13] subject of this action. Ms. Powers conduct as alleged in the complaint was "intentionally tortious" and thereby excluded from the chapter's requirements by section 10 [c] thereof. Additionally, Ms. Powers was sued individually by the

plaintiff, not just in her capacity as chairperson or member of the Commission and thereon is not amenable to statutory tort claim procedures. Section 10 [c] states:

> The provisions of sections one to eight, inclusive, shall not apply to:
> [c] any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations.

The complaint specifically uses the words of art "entered into a joint venture and sought through `**coercion and intimidation**' [emphasis added] to have the permit revoked pursuant to the discriminatory use of zoning restrictions."

A permit was issued by the building inspector Jack Keough on March 30, 1987, it was revoked on April 2, 1987 due to alleged violations of construction in a flood plain zone and "wetlands" considerations. The Conservation Commission on the same day as the permit was issued held a meeting and contrary to the advice of Town Counsel sought to have the project stopped on alleged violations of zoning violations. See: Exhibit "G" attached hereto and incorporated by reference.

The plaintiff was subsequently forced to incur both severe economic injury in the form of added expense in not beginning the construction of her residence until February 1989 and the loss of property rights and their usage. This injury continued throughout the process of her application for

the special permits necessary for the construction of her residence. Then the plaintiff was further delayed and dealt increasing economic harm by the Zoning Board of Appeals when by its decision of September 10, 1988 it enforced against the [R.A. p. 14] plaintiff a twelve hundred year [1200] flood plain restriction. This restriction also necessitated plaintiff's procurement of a variance to comply with lot set-back requirements. All said actions added to the delay experienced by the plaintiff. This enforcement has been characterized by the plaintiff in this action as a "taking". Said characterization rests on the premise that a one hundred year flood plain is held sufficient throughout the Commonwealth of Massachusetts. Uncontroverted expert testimony in Superior Court action 87-1077 [which this Court heard on the propriety of said zoning regulation] established that only one other town in the Commonwealth enforced a five hundred year flood plain. Evidence will be offered that some twelve and one tenth [12.1] acres of the plaintiff's land are being affected by the enforcement of the flood plain zoning decision. Ostensibly, four building lots would accrue if a one or five hundred year flood plain was recognized by the defendant, Town. The plaintiff contends that the health and safety police powers are being used as a subterfuge for governmental mandating of natural condition/open space considerations. The original goals of the Conservation Commission are being enforced through zoning police power--all in contravention to constitutional mandates.

The plaintiff under M.G.L. Chapter 79, sections 9 & 10 has moved to recover for this "constructive" taking. The plaintiff's position is that while the Courts [particularly this

Court] have upheld the validity of the zoning regulation as an appropriate exercise of home rule doctrine--the Town cannot have the advantage of enforcing the regulation without paying compensation for the resultant diminuation in value of the plaintiff's property. This proposition is supported by both state and federal constitutional law. The prior actions of the Town gave the plaintiff every reasonable expectation that she would be able to use the property which she had purchased for residential building sites in conformance with frontage and applicable acreage requirements. The Plaintiff relies heavily on the recent [R.A. p. 15] decision of the United States Supreme Court in **David H. Lucas v. South Carolina Coastal Council**, 60 LW 4842 [June 29, 1992]. See: Exhibit "H" attached hereto and incorporated by reference. Plaintif further intends to rely on **Cayon v. City of Chicopee** 277 N.E. 2d 116. As to the inapplicability of M.G.L. Chapter 258, section 4 the plaintiff relies on **Asiala v. City of Fitchberg** 24 Mass. App. Ct. 13, 505 N.E. 2d 575 [1987] as to the aforementioned notice requirement as to M.G.L. Chapter 79, section 9 & 10 relief. Suffice it to say, that the plaintiff alleges that no cause of action enumerated in her complaint falls under the purview of the Massachusetts Tort Claims Act.

Plaintiff says that the Town of Brimfield can be held liable under the theory expressed in **Schleissner v. Town of Provincetown**, 27 Mass. App. Ct. 392, 538 N.E.2d 995 [1989] especially in light that the Town has never attempted any resolution of the problem of water run-off onto the plaintiff's property. Even as of this date, the defendant town has not sought easements to alleviate this problem. The

Town, in fact, promotes its keeping the land in its natural condition through ignoring its illegal and continuing water nuisance. The release executed by the plaintiff excludes water damages occurring as to "injury" [emphasis added] to the land. It does not relate to an alleged "taking" by making the land a "unusable wetland" or virtual "marsh". The Town in furtherance of its negotiated settlement of action 87-592 blocked two or four culverts channeling water onto the plaintiff's property, allowing plaintiff to construct a residence on a small portion of the total property. The Town now, in fact, channels all the water that was diverted onto the plaintiff's property by four culverts with two culverts. This localizes the effect, enhances the wetness of the property and the plaintiff claims operates to act as a "taking" within the meaning of both the United States Constitution and the Massachusetts Declaration of Rights.

With regards to Count IV of the plaintiff's complaint alleging [R.A. p. 16] civil rights violations, the plaintiff intends to rely on **Bell v. Mazza**, 394 Mass. 176 181-182, 474 N.E.2d 1111, 1114 [1985]. Clearly, whether Ms. Powers was acting under color of law [in her capacity as chairperson of the Conservation Commission] is irrelevant. Plaintiff even acknowledges that a wrongful taking by a town or its agents is insufficient to show a civil rights violation. **Pheasant Ridge Assoc. Ltd. Partnership v. Town of Burlington**, 399 Mass. 771, 506 N.E.2d 1152 [1987]. The plaintiff will show that the defendant, Cynthia K. Powers had an interest in the land prior to its acquisition and that she intentionally used threats, coercion and/or intimidation to attempt to restrict building on the plaintiff's lands. That she

foremost sought to have the land remain as open space in its natural condition, contrary to the rights of the plaintiff to the enjoyment of those lands within the boundaries of appropriate police power regulation.

The Plaintiff support the counts of her action primarily on the theory as expressed in the **Lucas** case, when Justice Scalia opined for a 6 to 3 majority: . . "affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." 60 LW 4846 The plaintiff alleges that the Supreme Court has espoused a standard wherein a landowner may **upon reasonable expectations** [emphasis added] expect that his/her land may be used for a particular purpose. The defendant, Town, in this suit gave the purchaser no warning either in compliance with the statutory requirements or restriction of adjacent residential structures that the use of this land did not lend itself to single family residential buildings.

Appendix A

[R.A. p. 19]

RELEASE OF ALL DEMANDS

28 October 1988

In consideration of SIXTY THOUSAND DOLLARS ($60,000.00) to us paid by TOWN OF BRIMFIELD AND UNITED COMMUNITY INSURANCE COMPANY, both hereinafter called Second Party for purposes of this release, the receipt whereof is hereby acknowledged we do hereby remise, release and forever discharge the said Second Party of and from all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, damages and any and all claims, demands and liabilities whatsoever of every name and nature, both in LAW and in EQUITY, which against the said Second Party or their heirs, successors and assigns we now have or ever had from the beginning of the world to this date and more especially on account of all claims brought in the Superior Court of Hampden County Case #87-592 entitled MARY E. LEONARD VS. TOWN OF BRIMFIELD. This release excludes case #87-1238 except as to water channelling claims. (See indemnification agreement dated 10/28/88).

This release will also nullify any and all Chapter 93A claims brought against the Town of Brimfield and/or United Community Insurance Co. in the case of Mary E. Leonard v. Town of Brimfield, Case # 87-592.

Appendix A

Witness....hand and seal
Signed in the presence of

s/ Mary E. Leonard
. . . . . .
MARY E. LEONARD

. . . . . .

s/ Greg T. Schubert
. . . . . .
GREG T. SCHUBERT

EXHIBIT A

Appendix A

[R.A. p. 20]

INDEMNIFICATION RELEASE

In consideration of the payment made by UNITED COMMUNITY INSURANCE COMPANY on behalf of the TOWN OF BRIMFIELD in settlement of the claims brought by MARY E. LEONARD in Hampden County Superior court case #87-592, as evidenced by a release, a copy of which is attached hereto and marked "A", the parties hereto agree to indemnify and save harmless the UNITED COMMUNITY INSURANCE COMPANY from any and all claims, losses, damages or expenses arising from or resulting from claims brought by Mary E. Leonard against the Town of Brimfield in Hampden County Superior Court case #87-1238 and from any and all claims, losses, damages or expenses which may occur in the future to the property of the said Mary E. Leonard resulting from the channelling of water onto her property located on Dunhamtown-Palmer Road in the Town of Brimfield. This indemnification will run for one year from the date of execution of this release.

Witness our hands and seals this 28th day of October 1988.

s/ Edward Webb	s/ Mary E. Leonard
_____	_____
	MARY E. LEONARD
s/ (illegible)	s/ Greg T. Schubert
_____	_____
	GREG T. SCHUBERT

Appendix A

[R.A. p. 59] (Trial Transcript)

Testimony of Mary E. Leonard

8

Dunhamtown Road, Brimfield.

Q. Do you know how to spell it?

A. D-U-N-H-A-M-T-O-W-N.

Q. It's pronounced Dunnington (phonetic)?

A. I say Dunhamtown.

Q. And do you own real estate on that road, Miss Leonard?

A. Yes.

Q. And does it have an address number?

A. My address is 510.

THE COURT: I'm sorry what was the number?

THE WITNESS: 5-1-0

Q. (By Mr. Silverman) And when did you purchase this property?

A. I started purchasing it July or August of 1986. It was finalized in December of 1986.

Q. December of '86 is when you got the deed?

A. Yes.

Q. And who did you buy it from?

A. Quaboag Valley Nurseries.

Q. And at the time you bought it, Miss Leonard, can you describe it for the Court?

Appendix A

[R.A. p. 60]

A. It's 16 acres, little over 16 acres parcel. It's on the river that's off of Route 20.

Q. And what does it border?

A. It borders the Quaboag River on one side and it's on Dunhamtown Road.

Q. On the other side?

A. Yes.

Q. And I take it at the time you bought it, it was not subdivided in any way?

A. No.

Q. Was there a real estate broker involved in the transaction?

A. Yes.

Q. And who was that?

A. Tom Haley.

Q. What's his name?

A. Thomas Haley.

Q. Haley?

A. H-A-L-E-Y.

Q. Was there another broker?

A. Mr. Niserq.

Q. N-I-S-E-R-Q?

A. Yes.

Appendix A

[R.A. p. 93]

of the land?

A. When the building permit was submitted, it was indicated that it was going to be less than the 16 acres. And, in fact, the building inspector, I assume, was shown by Mr. Simcus where the lot was going to be where the house was going to be since we had to have the well put in. So as far as the building inspector, I assume he would have been concerned it was specific where the house was to be built.

Q. My question to you is that the Zoning Board of Appeals allowed you to build your house on a portion of the land?

A. Yes.

Q. A portion of the 16 acre parcel?

A. Yes.

Q. And you ultimately did construct your house on a portion of that 16 acre parcel?

A. Yes.

Q. And when did you complete your construction?

A. August of 1989.

Q. Now, with respect to the remaining portion of that land, is it fair to say the rest of the 16 acre parcel -- it is it fair to say it may be used for [R.A. p. 94] recreational purposes?

A. Yes.

Q. Is it fair to say it can be used for horticultural or agricultural purposes, should someone decide to put it to you?

A. Yes.

MR. HEWIG: Thank you very much. No further questions, Your Honor. ***

[R.A. p. 109]

Testimony of Jack Keough

58

Q. So the bylaws say if you're in the flood zone and want to build a house, you have to go for a special permit in front of the Zoning Board of Appeals?

A. Correct.

Q. And is isn't it fair to say, prior to the Leonard application, there had been applications to build on Dunhamtown Road that did not require a special permit from the Zoning Board of Appeals?

THE COURT: Are you talking about being --

MR. HEWIG: Objection.

THE COURT: Sustained.

THE WITNESS: Can I answer that?

THE COURT: Are you talking about after grandfathering it?

MR. SILVERMAN: No, prior to that. And even then people were allowed to build houses without going through what Ms. Leonard went through.

THE WITNESS: That's because there was a previous building inspection, previous to 1986.

MR. HEWIG: Your Honor, I don't think [R.A. p. 110] there was a question before the witness,

first of all. And secondly, if I may, the basis for my objection at this point is that the issue of whether this permit was arbitrarily or capriciously issued in comparison with what had gone on before has already been litigated through the SJC under Chapter 40A.

THE COURT: I understand, but I think Mr. Silverman is trying to understand if this is the taking of or the first time the board established the elevation of the 370 feet. I assume that's the point to get across. And that's been testified. This was the first time the board established this 370 foot elevation.

MR. SILVERMAN: I want to take it a step further to show houses were build on this street.

THE COURT: I'll allow it not to question the special permit, but whatever weight it has to the issue of where we are involved in a taking here.

Appendix A

[R.A. p. 171]

TOWN OF BRIMFIELD BUILDING DEPARTMENT
COMMONWEALTH OF MASSACHUSETTS
01010

87-1238H
Exh #2a
12-7-93

Jack Keough
Building Inspector
Town of Brimfield
Brimfield, Ma. 01010
April 2, 1987

Mary E. Leonard
40 Corey Colonial St.
Agawam, Ma. 01001

R.E. Building permit #8726 "Lot 12B" Dunhamtown Rd.
Brimfield

Dear Mary Leonard;

I am writing you in regard to the building permit I issued to Robert Simpkiss on March 30th. I have revoked

this permit for reasons you will find in the copy of a letter sent to Robert Simpkiss (enclosed). If you are aggrieved by this action please contact in writing Bruce Clarken/Town Counsel to request a hearing with this department.

Sincerely,

s/ Jack Keough
Jack Keough
Building Inspector

Enclosure

Appendix A

[R.A. p. 172]

TOWN OF BRIMFIELD BUILDING DEPARTMENT
COMMONWEALTH OF MASSACHUSETTS
01010

87-1238H
Exh #2b
12-7-93

Jack Keough
Building Inspector
Town of Brimfield
Brimfield, Ma. 01010
April 2, 1987

Robert Simpkiss
Fontaine Enterprises
25 Knox St.
Palmer, Ma. 01069

R.E. Building permit # 8726 'Lot 12B' Dunhamtown Rd.
Brimfield

Dear Robert Simpkiss;

As per our telephone conversation on April 2nd I am

revoking Building Permit #8726 dated March 30, 1987. The reason being: After further investigation I have determined that the lot owned by Mary E. Leonard, as represented on the building permit application, is located in the Town's designated Flood Zone, (according to the Town of Brimfield Zoning Map). Therefore by the Brimfield Zoning By-Law VI-C, Flood Plain Restrictions, I can not issue a building permit in this area without the approval of the Zoning Board of Appeals. Also, the lot size and location as represented on the application has not, (as of March 30th), been approved for subdivision by the Planning Board or registered with the Registry of Deeds. This also voids the application.

I have enclosed the application, septic permit, driveway permit and water test submitted. Also, a check for the permit fee has been returned to Attorney Greg Schubert, as the check was written by him.

If you are aggrieved by this action please contact in writing Bruce Clarken/Town Counsel to request a hearing with this department.

Copies of this letter have been forwarded to property owner Mary E. Leonard and Attorney Greg Schubert.

Sincerely,

s/ Jack Keough
Jack Keough
Building Inspector

Enclosures

Appendix A

[R.A. p. 175]

ZONING BOARD OF APPEALS
Brimfield, Massachusetts

TOWN OF BRIMFIELD
COMMONWEALTH OF MASSACHUSETTS

87-1238H
Exh #5
12-7-93

DECISION OF THE ZONING BOARD OF APPEALS FOLLOWING A DULY ADVERTISED PUBLIC HEARING ON MAY 4, 1987 ON THE PETITION OF MARY E. LEONARD REQUESTING A SPECIAL PERMIT FOR PROPERTY IN A FLOOD PLAIN DISTRICT ACCORDING TO THE TOWN OF BRIMFIELD'S ZONING MAP ON THE WESTERLY SIDE OF DUNHAMTOWN PALMER ROAD AND IS RECORDED IN THE HAMPDEN COUNTY REGISTRY OF DEEDS, BOOK 6335, PAGE 120, LOT 12.

The Petitioner applied for a zoning permit and was denied such because the Zoning Officer determined that Lot 12 as represented on the application is in a designated Flood Plain District according to the Town of Brimfield's official zoning map. The Brimfield Zoning-By-Laws state in Section

VI-C, Flood Plain Restriction, that a special permit is needed for uses otherwise permitted as set forth in Sections IV-A and IV-B. Before making a decision on the request, the Zoning Board of Appeals must determine that this property use in a flood plain district will not endanger the health and safety of the occupants.

A flood plain area is a fragile and extremely unpredictable part of our environment that has to be carefully scrutinized before it can be infringed upon by any individual for the purpose of habitation. The health and safety of the occupants, present and future is a concern of the board. However, the board must also consider any effects that the property use might have on the surrounding environment e.g. the river, the wetlands and also neighboring inhabitants.

After reviewing the property, holding a public hearing, and consulting Geographical Survey Maps, Hampden County Natural Resource Maps, Flood Insurance Rate Maps and the official Brimfield Zoning Map, we can derive the following:

1. Lot 12, 16.1 acres has an elevation of 360 feet at river level to approximately 400 feet elevation at the most north-easterly corner of the lot.
2. A large portion of lot 12 lies at an elevation of 360 feet to 365 feet.
3. Within this area of 360-365 feet elevation exists extensive wetlands - even to the uneducated eye.

With these observations in mind, the board feels that any property use within the 360 to 365 foot level would definitely endanger the health and safety of the occupants, effect the environments and possibly endanger neighboring inhabitants.

1. Flood crest levels of the river would create a hazard at the 360-365 foot level.

2. Septic systems within the 360-365 foot elevation would be rendered useless at flood crest levels and most likely contribute a pollutant to the environment. [R.A. p. 176]

3. Domestic water could be threatened at flood crest levels and septic system failures.

Taking these observations into consideration, the board finds that granting a special permit for property use of lot 12 would endanger the health and safety of the occupants. The use would also be a hazard to the environment and neighbors.

However, the board also feels that prohibiting property use of the entire area of lot 12 would be extreme and unfair to the petitioner. Any property use between the 360 to 365 foot elevation would be dangerous but with a five (5) foot safety factor; 370 foot elevation, the board feels property use could be utilized with safety to the occupants and also not pose an environmental hazard.

Therefore, the Zoning Board of Appeals grants a Special Permit for property use of lot 12 Dunhamtown Palmer Road with the following restriction:

Appendix A

1. Property use shall be limited to land at and above the 370 foot elevation mark.
2. This 370 foot elevation mark to be verified by the Brimfield Zoning Officer.
3. This decision must be recorded by the petitioner on Form 1094 with the Registry of Deeds.
4. Any action not taken on the decision within two years, deems this decision unfavorable.

Dated: 6-2-87

s/ Michael P. Koprowski
Michael P. Koprowski, D.D.S.
Chairman

s/ Arthur Bonneau
Arthur Bonneau

s/ Donald Fitzgibbons
Donald Fitzgibbons

6-15-87
A true copy, attest
s/ Doris Bodlaseh
TOWN CLERK

Appendix A

[R.A. p. 179]

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 87-1238H

MARY E. LEONARD
Plaintiff

v.

TOWN OF BRIMFIELD and
CYNTHIA K. POWERS,
Individually and as
Chairperson of the BRIMFIELD
CONSERVATION COMMISSION,
Defendants.

NOTICE OF APPEAL

The plaintiff, MARY E. LEONARD, appeals from the judgment entered against her on Counts I through IV of her complaint Judgment was entered on the 13th day of April 1994 by John F. Murphy.

Appendix A

MARY E. LEONARD
by her Attorney,

s/ Jean M. Fielding

Jean M. Fielding BBO# 558083
268 Adams Road
Greenfield, MA. 01103-1360
Tel. (413) 773-5494

Dated: May 2, 1994

APPENDIX B - COVER SHEET OF APPLICATION FOR LEAVE TO APPEAL, IN THE CASE OF *K&K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY V. DEPARTMENT OF NATURAL RESOURCES*

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
[Jansen, P.J., and Taylor and J.P. Noecker, J.J.]

K&K CONSTRUCTION, INC. J.F.K. COMPANY, and RESORTS AND COMPANY,	Supreme Court No.
Plaintiffs-Appellees	Court of Appeals No. 168393
v.	Lower Court No.
DEPARTMENT OF NATURAL RESOURCES,	88-012120-CM
Defendant-Appellant	

APPLICATION FOR LEAVE TO APPEAL

FRANK J. KELLEY
Attorney General

Appendix B

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Kevin T. Smith (P32825)
Assistant Attorney General
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Mason Building, 8th Floor
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Lansing, MI 48909
(517) 373-7540

FILED
JUL 2 1996
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Dated: July 2, 1996